91-198

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

HARRIS TRUST AND SAVINGS BANK, an Illinois banking corporation, not individually but as Trustee; and

LASALLE NATIONAL BANK, a national banking association, not individually but as Trustee,

Petitioners,

vs.

E-II HOLDINGS, INC. and AMERICAN BRANDS, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a trustee petitioning for a declaratory judgment presents a case or controversy when it seeks the declaration of its rights under a written instrument and an actual set of facts, but does not express a belief or preference regarding what conclusion the court should reach on the facts presented.

2. Whether the implied covenant of good faith and fair dealing afforded by the law of New York applies to all contractual instruments, and is not limited to those to which unsophisticated investors are parties.

PARTIES TO THE PROCEEDING

This petition is filed on behalf of two corporations, Harris Trust and Savings Bank, as Trustee, and LaSalle National Bank, as Trustee. The parent of Harris Trust and Savings Bank is Bank of Montreal; the parent of LaSalle National Bank is Algemene Bank Nederland N.V.

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Petitioners Harris Trust and Savings Bank, as Trustee, and LaSalle National Bank, as Trustee, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit (the "Appellate Court") affirming the decision of the United States District Court for the Northern District of Illinois (the "District Court") that dismissed the petitioners' action for a declaratory judgment construing the terms of indentures pursuant to which respondent E-II Holdings, Inc. issued $1.5 billion in unsecured debt securities to the public.

OPINIONS BELOW

The opinion of the Appellate Court is reported as *Harris Trust and Savings Bank v. E-II Holdings, Inc.*, 926 F.2d 636 (7th Cir. 1991), and appears in Appendix 1 to this petition. The opinion of the District Court is reported as *Harris Trust and Savings Bank v. E-II Holdings, Inc.*, 722 F. Supp. 429 (N.D. Ill. 1989), and

appears in Appendix 2 to this petition. The order of the Appellate Court denying petitioners' motion for rehearing with suggestion for rehearing *en banc* dated May 3, 1991 is reprinted in Appendix 3 to this petition.

JURISDICTION

The opinion of the Appellate Court in this matter was filed on February 21, 1991. A timely petition for rehearing with suggestion for rehearing *en banc* was filed on March 7, 1991. The Appellate Court's denial of the petition for rehearing was issued May 3, 1991 and is set forth in Appendix 3. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes at issue in this case are the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, and Sections 314, 315 and 322 of the Trust Indenture Act of 1939, 15 U.S.C. §§ 77nnn, 77ooo, 77vvv., which are set forth in Appendix A.

STATEMENT OF THE CASE

In this case, the Appellate Court broke new ground and set an unworkable precedent for trustees, in that it held that unless trustees suggest in their complaint for declaratory judgment and instructions what outcome they prefer, they fail to present a case or controversy. Furthermore, the Appellate Court held that trustees must formulate such a position without the benefit of essential information. It is respectfully submitted that this holding, which is based in large part on a misreading of precedent, contravenes the vast body of authority interpreting the Declaratory Judgment Act and recognizing the right of trustees to judicial instructions.

If permitted to stand, this distortion of sound precedent would bar from the federal courts corporate trustees charged with the duty of monitoring compliance with trust indenture terms, as such trustees could expose themselves to potential liability if they express an opinion concerning the existence of a default in a lawsuit without sufficient factual information and without having acted on that opinion. As a result, trustees could

find themselves with virtually no effective means for obtaining necessary information and ascertaining whether a default has occurred, which, in turn, carries the potential for harming the investors who the trustees are trying to protect. In short, the anomalous decision of the Appellate Court would do that which the Honorable Learned Hand warned should never be done—that the "law ought not to make trusteeship so hazardous that responsible individuals and corporations will shy away from it." *Dabney v. Chase Nat'l Bank*, 196 F.2d 668, 675 (2d Cir. 1952), *cert. dismissed*, 346 U.S. 863 (1953). At a time when billions of dollars have been invested in high-yield debt securities that are either in default or on the brink of default, contravening the warning of Judge Hand carries grave consequences with far-reaching effects.[1]

A. History of E-II and its $1.5 Billion in Debt Securities

Respondent E-II Holdings, Inc. ("E-II") was formed in May 1987 with an initial portfolio of fifteen operating subsidiaries that had once been part of Beatrice Companies, Inc., and which had combined annual operating earnings of $145.1 million. A-20-21. It was in this robust state of financial health that, on July 1, 1987, E-II offered to the public $1.5 billion in unsecured debt securities, consisting of $750,000,000 original principal amount 12.58% Senior Subordinated Notes due March 1, 1987 ("Notes"), which E-II issued pursuant to an indenture dated as of July 1, 1987 between E-II and petitioner Harris Trust and Savings Bank ("Harris"), as Trustee; and $750,000,000 original principal amount 13.05% Subordinated Debentures due March 1, 1999 ("Debentures") issued pursuant to an indenture dated as of July 1, 1987

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[1] The Appellate Court dismissed this warning as a mere "judicial maxim," saying it does not extend jurisdiction. A-9. This disdainful tone, which permeates the opinion, is set in its opening words, where it refers to high-yield debt securities as "quite literally, junk." A-1. It is respectfully submitted that the estimated $200 billion market in publicly-traded high-yield debt securities is a matter which deserves the serious consideration of the judiciary. *See Junk Bond Prices Hold Steady Despite Report that Defaults Hit a Record in the Latest Period*, Wall St. J., April 9, 1991, at C17, col. 1; Hector, *How Junk Regained Its Shine*, Fortune, July 15, 1991, at 98.

between E-II and petitioner LaSalle National Bank ("LaSalle"), as Trustee.[2]

In December 1987, E-II attempted a hostile takeover of American Brands, Inc. ("American Brands"). A-21-22. On January 22, 1988, American Brands instituted what is known as a "pac man" defense to the E-II takeover bid, by which it acquired E-II through its wholly-owned subsidiary, AMBR Holdings, Inc. ("AMBR"). A-22.

On January 25, 1988, AMBR commenced a tender offer for the Notes, at which time AMBR made public assurances that American Brands intended to retain a core group of businesses in E-II. A-22-24. The Trustees were informed by certain holders that the stated intentions of American Brands were viewed positively in the market place. This information was substantiated by the fact that the secondary market price of the Notes and Debentures rose following the announcement by American Brands, and the undersubscribed tender offer for the Notes expired by its own terms. A-24-25.

B. Post-Acquisition Extraordinary Transactions

Thereafter, it appears that E-II was systematically stripped of its operating subsidiaries for prices that some contend were below fair market value in a series of extraordinary transactions. E-II itself was ultimately sold to the highly-leveraged Riklis Family Corporation ("RFC"). A-25.

1. Initial Sale of Two Subsidiaries

Among the extraordinary transactions was the sale of two subsidiaries in the spring of 1988 to subsidiaries of American Brands for $278 million. The Trustees made repeated requests that E-II provide information sufficient to permit a determination of whether these subsidiary sales complied with the Indentures and applicable law. A-25. None was given.

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[2] For ease of reference, the petitioners are referred to herein as the "Trustees" and the substantially identical indentures under which the Trustees serve are referred to as the "Indentures." The provisions of the Indentures at issue in this case are reprinted in Appendix 5.

Shortly thereafter, E-II submitted annual officers' certificates that happened to be due at the time.[3] These certificates, which set forth no underlying facts, state in conclusory terms that no defaults existed. A-25.

2. Sale of Five Subsidiaries and Sale of E-II to RFC

Immediately following delivery of the annual officers' certificates, on June 13, 1988, American Brands announced that it was selling E-II to RFC. A-26. The price of the Notes and Debentures plummeted, as the financial markets viewed the credit risk associated with the debt-laden RFC as far inferior to that associated with American Brands. A-26. Two weeks later, E-II sold five more subsidiaries to American Brands. A-26.

The Trustees requested that E-II furnish an opinion of counsel that these sales did not violate any provisions of the Indentures, including but not limited to Section 4.06, which governs maintenance of properties, and Section 5.01, which limits E-II's ability to enter into consolidations and mergers and requires, among other things, that E-II deliver to the Trustees an officers' certificate attaching arithmetic computations demonstrating that, following the merger or consolidation, the consolidated interest expense ratio in the surviving company meets specified criteria. A-30-35; A-61; A-62-63. The Trustees also renewed their requests for financial information concerning the first two subsidiaries' sales. A-30-35.

E-II never furnished the Trustees with an opinion or other information concerning the sale of the first two subsidiaries, despite the fact that the Trustees made repeated requests pursuant to Section 11.05 of the Indentures. A-30-35; A-70-71. With respect to the sale of the five subsidiaries and the sale of E-II to RFC, E-II gave the Trustees one opinion of counsel dated June 22, 1988, which was based solely upon information supplied by E-II. The opinion stated that the restrictions relating to consolidations and mergers set forth in Section 5.01 of the Indentures did not apply to either sale. A-32. As for the maintenance of

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[3] Section 4.07 of the Indentures require E-II to deliver to the Trustees within one hundred days of the end of the fiscal year an officers' certificate stating whether the author knows of any default. A-28; A-62.

properties covenant contained in Section 4.06, the opinion stated in the alternative that such section did not apply to the sale of the five subsidiaries, or, if it did, that the transaction complied with its terms. A-32.

With respect to the sale of the five subsidiaries only, E-II gave the Trustees one additional piece of documentation, a copy of an opinion dated June 14, 1988 which Morgan Stanley & Co., Inc. ("Morgan Stanley") rendered to E-II. This opinion, which states that it was based upon information which E-II provided and which Morgan Stanley did not verify, concludes that the five subsidiaries were sold for fair value. A-33.

Despite repeated requests from the Trustees, E-II provided no further information or opinions regarding the financial consequences of the sales.

3. Fabergè Transaction

On July 1, 1988, McGregor Acquisition Corporation ("McGregor"), an indirect subsidiary of RFC, purchased 1,000 shares of E-II common stock for $950 million in cash and $250 million in McGregor stock, and then "contributed" all of the outstanding shares of common stock of another subsidiary, Fabergè, Inc., ("Fabergè") in exchange for 840 shares of E-II common stock. The board of directors valued the Fabergè stock at $925 million, but certain holders have suggested that the true value was as low as $93 million. Nevertheless, immediately following this transaction, the new E-II board of directors declared a cash dividend of $925 million, which it paid to McGregor, and which, upon information and belief, was syphoned off for the benefit of affiliates of RFC. A-26.

Following this transaction, the Trustees wrote to E-II, stating that in order to determine whether there had been a violation of Section 4.02 of the Indentures, which places restrictions on dividends and stock payments, the Trustees urgently needed specific information about the transaction and its financial consequences. A-33-34. E-II never provided any responsive information. A-34-35.

C. Trustees' Attempts to Obtain Information

Throughout this period, the Trustees made repeated demands pursuant to the express and implied terms of the Indentures, including but not limited to Section 11.05 thereof, that E-II furnish information that would facilitate a determination of whether the extraordinary transactions constitute breaches of Indenture covenants or violations of applicable law. A-30-31. The Trustees sought such information in an effort to ascertain whether E-II had violated any of the covenants or agreements contained in the debt securities and Indentures, thus triggering an Event of Default within the meaning of Section 6.01 of the Indentures. A-30-35; A-64-66. Pursuant to Section 7.02, the Trustees asked E-II to furnish officers' certificates and opinions of counsel before making their determination of whether further action was warranted. A-29–31; A-69-70.

The Appellate Court characterized the reaction of the Trustees to these extraordinary transactions as "uneasiness," A-2, yet that body recognized that a significant number of holders sent notices of default to Harris as Trustee, asserting that the extraordinary transactions violated the financial covenants contained in the Indentures, and that E-II made continuing threats to sue anyone who issued a notice of default. A-3.[1]

E-II took the position that the Trustees are not entitled to any of the requested information, and that the Indentures require the Trustees to conclusively rely on the annual officers'

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[1] When they issued the notice of default, the group of holders claimed that they represented a majority of the outstanding Notes. Thereafter, this group discovered that they fell just short of representing a majority. A-3. Section 6.05 of the Indentures grants the holders the power to direct the Trustees to pursue remedies against E-II on their behalf when such directions come from the holders of a majority of the outstanding debt. A-67. Under Section 6.01(4), the declaration of a default under one debt issue can, under certain circumstances, trigger a cross-default under the other issue. A-64-65.

certificates and the conclusory opinions which E-II had furnished to them.[5] A-30-33. The Trustees pointed out to E-II and the courts below that the Indentures state the Trustees "may" rely on such certificates and opinions, not that they must so rely. *See* Indentures § 7.01, A-69.[6]

As the Appellate Court noted, this situation placed the Trustees "in a quandary the likes of Scylla and Charybdis." A-3. E-II claimed that, if the Trustees declared a default, cross-default provisions in other credit agreements could cause the collapse of E-II, for which both E-II and holders alike might blame the Trustees if it later came to light that the extraordinary transactions did not cause a breach of any Indenture covenant. In fact, when Harris, as Trustee, responded to the notices of default it received from holders purporting to represent a majority of the outstanding Notes by issuing its own notice of default, E-II sued the Trustees and the holders who submitted the notices,[7] and threatened to do so again if another notice of default were issued. If, on the other hand, an undetected default did exist, the failure to sue E-II could have resulted in litigation as well. A-3-4.

After months of making requests and then demands for information, and receiving notices of default and other demands from holders, all of which required serious consideration, though under the terms of the Indentures were insufficient to direct the

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[5] No opinion of counsel or other professional was provided with respect to either the sale of the first two subsidiaries or the Fabergè transaction, nor was any officers' certificate provided specifically addressing any of the extraordinary transactions.

[6] In taking this position, E-II conveniently overlooks the fact that this permissive reliance applies only when an Event of Default is not continuing. *See* Section 7.01(b) of the Indentures, A-68. By withholding information from the Trustees, E-II has prevented the Trustees from ascertaining whether a default occurred.

[7] The action, brought in a New York state court, was entitled *E-II Holdings, Inc. v. Harris Trust and Savings Bank*, Index No. 89/01003 (N.Y. Sup. Ct. filed Jan. 23, 1989). When it was discovered that the holders who submitted notices of default represented slightly less than a majority of the outstanding debt, E-II dismissed its suit without prejudice.

Trustees to act, the Trustees followed the time-honored, prudent practice of filing an action for a declaratory judgment and instructions determining whether the extraordinary transactions contravened any express or implied provisions of the Indentures or the Trust Indenture Act, and delineating the rights of the Trustees to information concerning such extraordinary transactions and any similar actions that might take place in the future. *See* A-19. Specifically, the Trustees seek a judicial determination of:

a. whether the extraordinary transactions constitute a breach of Indenture covenants or principles of applicable law and equity, including the implied covenant of good faith and fair dealing;

b. whether E-II violated the Trust Indenture Act;

c. whether one or more of the extraordinary transactions constituted a default under the terms of the Indentures;[5]

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[5] Shortly after the Appellate Court issued its opinion, E-II announced that it would default on its obligation to pay interest on the Notes and Debentures. *Concern Won't Pay Interest on Junk Bonds on Friday,* Wall St. J., Feb. 27, 1991, at C17, col. 3. Thus, a payment default has occurred, and, as a consequence, it appears that the issue of whether E-II has sufficient remaining assets to ensure repayment of principal and interest on the debt is moot. However, all other issues raised in this case—whether the extraordinary transactions constituted a breach of Indenture covenants, and whether the Trustees are entitled to the information E-II denied them—remain live issues that are ripe for adjudication. If any or all of the extraordinary transactions did constitute a breach of financial covenants, claims against the participants and those who concealed such activities are created and the validity of such transactions is subject to challenge. It appears that pursuing such claims against third parties might provide avenues through which holders could obtain repayment of the outstanding debt.

Similarly, the need for information remains viable. Although E-II may claim that it is sharing information with holders at this time, such communications are limited to certain large holders who have agreed to refrain from trading their securities. No information is being provided

(footnote continues)

d. what action the Trustees should take with respect to the notices of default they received from the holders representing a bit less than the majority of the outstanding debt in one of the issues;

e. whether the terms of the Indentures permit further asset sales; and

f. whether the terms of the Indentures give the Trustees the right to obtain information concerning the extraordinary transactions to supplement the mere conclusory opinions and certificates that E-II supplied and the Trustees rejected as inadequate, and, if so, the nature and extent of such information.

A-37-38.

D. Bases for Federal Jurisdiction in the District Court

The District Court had federal question jurisdiction over the action pursuant to 28 U.S.C. § 1331, as the claims asserted in this case are based, in part, on Section 322 of the Trust Indenture Act of 1939, 15 U.S.C. § 77vvv, in that this is an action to, *inter alia*, effectuate the purpose of that Act, including but not limited to Sections 314 and 315 thereof, 15 U.S.C. §§ 77nnn-ooo. Another basis for jurisdiction is provided by 28 U.S.C. § 1332, in that there exists complete diversity between the Trustees on the one hand and E-II and American Brands on the other, and the amount in controversy exceeds $50,000, exclusive of interest and costs.

E. Disposition in the Courts Below

The District Court never reached the merits of this case, but instead dismissed it at the pleading stage. Despite the raging controversy over whether E-II breached the covenants contained in the Indentures, the District Court reached the incredible conclusion that the Trustees' request to determine the existence of a

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(footnote continued)

to the Trustees, or to the unrestricted holders. Thus, the Trustees continue to have a need for the information they seek in this action in order to protect the holders who are not privy to the information divulged to the restricted holders.

default fails to constitute a case or controversy. A-43. As to the request for further information, the District Court incorrectly concluded that the governing law of New York does not imply any duty not expressly provided for in the Indentures. A-46.

The Appellate Court affirmed. Relying on a misreading of *Princeton Univ. v. Schmid*, 455 U.S. 100 (1982) (per curiam) (*"Schmid"*), the Appellate Court stated that the Trustees failed to present a justiciable case or controversy merely because they did not state whether they agreed with the holders who claim E-II is in default, even though the complaint sets forth an ample factual predicate. A-7-8. With respect to the claim that the Trustees are entitled to further information pursuant to the implied covenant of good faith and fair dealing, the Appellate Court recognized that such covenants are implied under New York law, but incorrectly concluded that their application is limited to cases involving unsophisticated investors. A-13,16. It is respectfully submitted that such an outcome is incongruous, as it requires the Trustees to take a position regarding the existence of a default while at the same time depriving them of information on which they could formulate a reasonable basis for doing so.

Both the District Court and the Appellate Court found that the Trust Indenture Act provides no basis for the relief the Trustees seek. A-45-46; A-16-17.

REASONS FOR GRANTING THE WRIT

The critical issue presented in this case is whether indenture trustees may be afforded the benefit of the declaratory judgment procedure, including the protection from liability which declaratory judgments offer other litigants.[9]

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[9] At this time, it is estimated that the size of the publicly-traded high-yield debt securities market is $200 billion. *Junk Bond Prices Hold Steady Despite Report that Defaults Hit a Record in the Latest Period*, Wall St. J., April 9, 1991, at C17, col. 1. Although there are conflicting predictions of whether the $22 billion in defaults experienced in 1990 represents a peak or a trend, *see id.*; Hector, *How Junk Regained Its Shine*, Fortune, July 15, 1991, at 98; *Corporate Bond Defaults Show Sharp Decline*, Wall St. J., July 10, 1991, at C1, col. 3, it is clear that the question of

(footnote continues)

In this case, the issuer of $1.5 billion in high-yield debt securities engaged in a series of transactions that caused a radical transformation of its character and rendered it incapable of meeting its obligation to repay the unsecured debt represented by those securities. When a significant group of holders expressed alarm about the effect of the transactions, the Trustees sought information from E-II in an effort to ascertain whether E-II was in compliance with the terms of the Indentures. When E-II refused the requests for information, and a number of holders that was large, though insufficient to direct the Trustee to act, issued notices of default, the Trustees acted in accordance with long-standing practice of prudent indenture trustees—they commenced an action for a declaratory judgment and instructions. Because a critical issue in the case is whether the Trustees are entitled to information they have not been given, but which is vital to a determination of the existence of a default, and because announcing in a lawsuit that the Trustees believed a default existed could have had a negative impact on the market for the securities, raised issues concerning potential defaults under other debt obligations of E-II and carried potential liability for the Trustees,[10] the complaint asks the court to determine whether there has been a default, and to delineate the Trustees' rights. In short, the Trustees presented a classic action by a trustee for instructions and a declaratory judgment construing the terms of contractual instruments.

Both the District Court and the Appellate Court turned the Trustees away at the courthouse door, stating that unless the complaint indicates whether the Trustees think there has been a default, there is no case or controversy. Yet, those courts also ruled that the Trustees are not entitled to information that might

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(footnote continued)

whether indenture trustees have access to the federal courts to address complex questions of compliance with indenture covenants is one of great significance.

[10] Some might question the prudence of trustees who allege in a federal court pleading, which is subject to the strictures of Rule 11 of the Federal Rules of Civil Procedure, that such trustees believe a default has taken place but who have not otherwise acted on such belief.

enable them to determine whether a default occurred. Presumably, the courts below would have considered the identical facts pled in the complaint to qualify as a case or controversy if the Trustees had added their voices to those of the holders who believe the events described therein constitute a default.

By grafting the artificial and constitutionally unnecessary condition that trustees "take a position" onto the case or controversy requirement, the Appellate Court has rendered the Declaratory Judgment Act incapable of performing its intended function—that of affording parties a determination of their rights before an injury has been done—when the parties seeking that determination are indenture trustees. If it is still true that the "law ought not to make trusteeship so hazardous that responsible individuals and corporations will shy away from it,"[11] the anomalous ruling of the Appellate Court must be reversed.

I

REVIEW IS WARRANTED BECAUSE THE APPELLATE COURT'S DECISION UNREASONABLY RESTRICTS THE UTILITY OF THE DECLARATORY JUDGMENT PROCEDURE

A. The Facts of this Case Meet the Time-Honored Standards for Declaratory Relief

The declaratory judgment procedure "enables parties who are uncertain of their legal rights, and are . . . prejudiced by actual or potential adverse claims by others, to invoke the aid of the courts for the determination of their rights before an injury has been done." H.R. REP. NO. 1264, 73d Cong., 2d Sess. 2 (1934). According to the Committee on the Judiciary, "[t]he principle involved in this form of procedure is to confer upon the courts the power to exercise in some instances preventive relief; a function [then] performed rather clumsily by our equitable proceedings and inadequately by the law courts." H.R. REP. NO. 1264, 73d Cong., 2d Sess. 2 (1934). It is this type of preventive relief that the Trustees sought, and to which they are entitled.

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[11] *Dabney v. Chase Nat'l Bank*, 196 F.2d 668, 675 (2d Cir. 1952) (Hand, J.), *cert. dismissed*, 346 U.S. 863 (1953).

The error in the Appellate Court's opinion becomes apparent upon a thorough analysis of the cases and commentaries construing the constitutional "case or controversy" requirement. The formulation is by now quite familiar: the matter presented to the court "must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937) (*"Aetna Life"*).

The Court has long recognized the practical difficulties of applying this formulation, and has struggled to establish workable guidelines: "The difference between an abstract question and a 'controversy' . . . is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy." *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941). Yet, the Appellate Court makes the facile suggestion that a precise test is possible—if the petitioners do not state the outcome they desire, no further analysis is necessary. It is respectfully submitted that if such simplistic formulations were possible, they would not have eluded the judiciary as a whole for decades.

"Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." 312 U.S. at 273. Had the Appellate Court considered all the circumstances surrounding this case, it would have recognized that a formidable controversy is raging over whether the extraordinary transactions put E-II in breach of Indenture covenants. E-II steadfastly refused the Trustees' repeated demands for information that might reveal whether one or more of the extraordinary transactions caused a default. By rejecting the annual officers' certificates in which E-II asserted that no default exists, the Trustees have "taken a position" and thus pitted themselves against E-II in the controversy. As for the "adverse legal interests" of the parties in court, they are the signatories to the Indentures. E-II, as the issuer of the securities, is bound to honor its covenants, while the Trustees must monitor

such compliance. Also embroiled in the controversy are the holders, whose interests the Trustees represent.

According to *Aetna Life*, "[a] justiciable controversy is . . . distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. [Citations omitted.] The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests." 300 U.S. at 240-41. Declaratory judgments are available to give a declaration of the "existence or non-existence of any right, duty, power, liability, privilege, disability, or immunity or of any fact upon which such legal relations depend . . . ." FED. R. CIV. P. 57 advisory committee note. The procedure is available to any party who has "a practical interest in the declaration sought." *Id.* *See Kunkel v. Continental Casualty Co.*, 866 F.2d 1269, 1274 (10th Cir. 1989). The case *sub judice* clearly meets these requirements.

There is nothing hypothetical or abstract about the dispute presented in this case. The Trustees are seeking a declaration of rights, duties, powers, liabilities and facts upon which the legal relations between the Trustees and E-II depend. The Trustees submitted a detailed description of specific transactions and asked the court to determine whether they caused a breach of the Indentures or a violation of law.

The Trustees did not present this definite, concrete dispute to the court to satisfy mere academic curiosity. To the contrary, determination of the issues in the complaint would have a direct effect on the nature and scope of their duties, as the existence of a default transforms the role of the Trustees from a contractual one to that of a prudent fiduciary. *See, e.g.*, Sections 6.03 and 6.06 of the Indentures, A-66-68. It is only upon the occurrence of a default that the Trustees are authorized to pursue remedies against the issuer. *Id.*; 15 U.S.C. § 77ooo(c); Indentures § 7.01; A-77-79. *See In re Multiponics, Inc.*, 436 F. Supp. 1072, 1075 (E.D. La. 1977), *aff'd*, 622 F.2d 731 (5th Cir. 1980). Thus, at the inception of this proceeding, the practical effect of a declaration that E-II violated its financial covenants would have been that the Trustees could have issued notices of default without running the risk that E-II would once again bring suit against them, and that the Trustees would have had certain additional remedies at their

disposal. At the present time, the effect would be that the Trustees and all of the holders may determine whether any of the extraordinary transactions is susceptible to challenge, and whether any other rights or remedies exist. In other words, a determination of the issues touches the legal relationship of the parties to this proceeding.

B. The Appellate Court's Decision is Based on a Misinterpretation of Precedent

The Appellate Court purported to rest its novel opinion that this dispute fails to rise to the level of a case or controversy on *Aetna Life*, "common sense" and *Princeton Univ. v. Schmid*, 455 U.S. 100 (1982) (per curiam). *See* A-7. That the *Aetna Life* standards support the position of the Trustees has been discussed. That the Trustees disagree with the Appellate Court's notion of common sense is manifest. What remains to be addressed is the decision in *Schmid*.[13]

The unique procedural posture and facts of *Schmid* limit the application of that case. Mr. Schmid was arrested for distributing political materials on the Princeton University campus. At the time of his arrest, Princeton had in effect regulations requiring members of the public to obtain permission from University officials before distributing materials on campus. Mr. Schmid appealed his conviction, and the case was certified to the New Jersey Supreme Court, which court invited the University to intervene.

While the appeal was pending, the University amended its regulations governing the activities for which Mr. Schmid was convicted. The Supreme Court of New Jersey held that the regulation violated Mr. Schmid's rights of free speech and assembly. The University appealed, and the State of New Jersey joined in the University's jurisdictional statement.

In the Supreme Court, a combination of factors appear to have caused dismissal for want of jurisdiction. First, as to the

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[13] The Appellate Court took the parties to task for not bringing the *Schmid* case to its attention. *See* A-7 n.11. It is respectfully submitted that *Schmid* was never mentioned in the briefs in the courts below because it is wholly inapplicable to the present case.

University, the issue became moot, because the regulation was no longer in effect. The Court stated that the University was free to file another enforcement action based on its then-existing regulations, if it wished to test their validity. The Court then found itself without a case or controversy when the State filed a brief declining to take a position on the validity of the regulation. Thus, the Court did not have before it an adverse party with an interest in the outcome of the proceeding as it related to the regulation at issue.

The present case does not suffer from any of the substantive infirmities that plagued *Schmid*. The parties to this action are the parties to the Indentures, the contractual instruments at issue in the case. An adjudication on the merits of this case will affect the legal relationships of those parties, who are also the parties to the lawsuit. By the time *Schmid* reached this Court, an adjudication of the merits would not have had a direct impact on either the State of New Jersey or Princeton University. In the purest sense, the only interest of the parties to the *Schmid* case was academic and abstract, whereas the interest of the parties to this case is real, immediate and concrete. The Trustees did not institute this action because of an idle curiosity about what acts would constitute a breach of the financial covenants contained in some indentures that are no longer in force. Rather, they commenced proceedings in order to obtain an adjudication of their rights under Indentures that constitute the loan agreements for millions of dollars of outstanding unsecured debt. These are real, justiciable issues that constitute a case or controversy involving the parties in court. Accordingly, the *Schmid* case provides no guidance to a determination of the present case.

C. Declaratory Relief is Particularly Well-Suited to Contractual Instrument Interpretation of the Type Sought in the Present Case

A review of the reported cases reveals that, time and again, the courts have determined that declaratory relief is particularly appropriate in disputes over the interpretation or construction of a contract or other instrument. *Cherry, Bekaert & Holland v. Downs*, 640 F. Supp. 1096 (W.D.N.C. 1986); *Motor Terminals, Inc. v. National Car Co.*, 92 F. Supp. 155, 161 (D. Del. 1949) ("declaratory

judgment is a form of remedial procedure which is particularly appropriate where the basic issue . . . is the interpretation or construction of a contract") (cited with approval in *Jones v. Pepsi-Cola Co.*, 223 F. Supp. 650, 652 (D. Neb. 1963)). *See Panhandle Eastern Pipe Line Co. v. Michigan Consol. Gas Co.*, 177 F.2d 942, 944 (6th Cir. 1949); *Burger King Corp. v. Family Dining, Inc.*, 426 F. Supp. 485, 487 (E.D. Pa.), *aff'd*, 566 F.2d 1168 (3d Cir. 1977); *City of Leominster v. Pittsburgh-Des Moines Steel Co.*, 201 F. Supp. 66 (D. Mass. 1962). Even the Appellate Court agrees. *See John Hancock Mut. Life Ins. Co. v. Webcor, Inc.*, 311 F.2d 701, 705 (7th Cir. 1962). *Accord Kunkel v. Continental Casualty Co.*, 866 F.2d 1269 (10th Cir. 1989); *ACandS, Inc. v. Aetna Casualty and Sur. Co.*, 666 F.2d 819 (3d Cir. 1981); *Lyons Sav. and Loan Ass'n v. Geode Co.*, 641 F. Supp. 1313 (N.D. Ill. 1986).

Perhaps the greatest value of declaratory judgments in controversies over the interpretation of contractual obligations is the protection afforded the contracting parties from acting at their peril. For example, the Tenth Circuit has held that a contracting party may avoid the risk that its intended actions might be deemed a breach by bringing a declaratory judgment proceeding. *Keener Oil and Gas Cos. v. Consolidated Gas Util. Corp.*, 190 F.2d 985 (10th Cir. 1951). The Fifth Circuit has stated that the declaratory judgment is intended to provide a means of settling an actual controversy before it ripens into a violation of law or breach of a contractual duty. *Rowan Cos. v. Griffin*, 876 F.2d 26, 28 (5th Cir. 1989). In *Fine v. Property Damage Appraisers, Inc.*, 393 F. Supp. 1304, 1310 (E.D. La. 1975), the court held that "a party may not be compelled to breach the contract in order to determine the legal consequence of that breach, and a declaratory judgment is a proper vehicle for relief." 393 F. Supp. at 1310. In that case, the validity of an anti-competition clause was challenged. The court noted that such a situation was particularly compelling, since the plaintiff's only alternative means of testing the validity of the provision was to breach the contract, thereby subjecting himself to the risk that the clause was enforceable against him. *See generally Hal Roach Studios, Inc. v. Richard Feiner and Co.*, 896 F.2d 1542 (9th Cir. 1989).

This case presents circumstances that are even more compelling, as the risks attendant to an erroneous declaration of default are enormous. According to E-II, who sued the Trustees regarding

the issuance of a notice of default once before, such notices have potentially devastating effects. On the other hand, the absence of a default declaration when the circumstances warrant one carry the potential for severe consequences to the investment of the holders. Yet, the Appellate Court chose to deprive the Trustees of this all-important benefit.[14]

Obviating the need for litigants to act at their peril is a recurring theme in both the cases and commentaries interpreting the Declaratory Judgment Act. The Ninth Circuit has referred to "the type of Damoclean threat that the Declaratory Judgment Act is designed to avoid." *National Basketball Ass'n v. SDC Basketball Club, Inc.*, 815 F.2d 562, 566 (9th Cir.), *cert. dismissed sub nom., Los Angeles Memorial Coliseum Comm. v. National Basketball Ass'n*, 484 U.S. 960 (1987). *See Kunkel v. Continental Casualty Co.*, 866 F.2d 1269, 1274 (10th Cir. 1989) ("The Act enables parties uncertain of their legal rights to seek a declaration of rights prior to injury."). The Appellate Court has expressed similar thoughts: "It was the congressional intent to avoid accrual of avoidable damages to one not certain of his rights . . . ." *Milwaukee Gas Specialty Co. v. Mercoid Corp.*, 104 F.2d 589, 592 (7th Cir. 1939); *E. Edelman & Co. v. Triple-A Specialty Co.*, 88 F.2d 852, 854 (7th Cir.), *cert. denied*, 300 U.S. 680 (1937). The federal courts across the country are in agreement. *See National R.R. Passenger Corp. v. Consolidated Rail Corp.*, 670 F. Supp. 424, 430 (D.D.C. 1987) (declaratory judgment procedure enables parties in a dispute over contract rights to secure a declaration about such rights before a breach); *Central Hudson Gas & Elec. Corp. v. Benjamin F. Shaw Co.*,

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[14] In what appears to be a gesture of reassurance, the Appellate Court stated that a default need not be declared in order to meet its justiciability test. A-9-10. This gives indenture trustees little comfort, as the mere requirement to express a view concerning potential defaults creates potential liability. If a trustee files a lawsuit alleging its "belief" that a default has taken place, which is tantamount to an assertion that a default has occurred, the trustee is subject to criticism and potential liability from its beneficiaries for not taking affirmative action based upon such belief. Further, there is a real issue of whether the lawsuit itself should be deemed a notice of default. Certainly, the market for the securities would experience a negative impact by the filing of such a suit and conceivably some debtholders could suffer a loss on account of such a filing.

465 F. Supp. 331 (S.D.N.Y. 1978) (declaratory judgment to determine the binding effect of a release would spare the parties uncertainty); *Public Affairs Assoc. v. Rickover*, 268 F. Supp. 444 (D.D.C. 1967) (threat to sue if speeches were published was sufficient to meet the case or controversy threshold); *Paramount Pictures Corp. v. Holden*, 166 F. Supp. 684, 691 (S.D. Cal. 1958) ("The very object of the declaratory judgment is to seek a court's determination of the rights of the parties when a controversy exists, even before [their] acts . . . result in damages."). *See also Tempco Elec. Heater Corp. v. Omega Eng'g, Inc.*, 819 F.2d 746, 749 (7th Cir. 1987) (declaratory judgment is available where a party desires a determination of the legal effect of a proposed or past course of action); *McDougald v. Jenson*, 786 F.2d 1465, 1481 (11th Cir.), *cert. denied*, 479 U.S. 860, *reh'g denied*, 479 U.S. 1001 (1986) (the objectives of declaratory judgments include that of providing persons threatened with liability, but otherwise without a remedy, an early adjudication of an actual controversy).

In noting that a primary purpose of the Declaratory Judgment Act is to protect litigants from insecurity and uncertainty, one commentator quoted Congressman Gilbert of Kentucky as saying:

> "Under the [then-existing] law you take a step in the dark and then turn on the light to see if you stepped into a hole. Under the declaratory judgment law you turn on the light and then take the step."

Note, *Judicial Relief from Peril and Insecurity*, 45 HARV. L. REV. 793, 807 (1932) (quoting 69 CONG. REC. 2108 (1928)). The courts have not hesitated to turn on that light for litigants, particularly in contract interpretation cases.

In effect, the Appellate Court's decision in this case is a proclamation that trustees alone must act at their peril while all other parties to contractual instruments may enjoy the protection from risk of liability that the declaratory judgment procedure offers. There is absolutely nothing in the decided cases or authoritative commentaries that justifies singling out trustees to deprive them of the benefits of this remedial procedure.

D. Courts Routinely Offer the Type of Relief the Trustees Seek in this Case

Despite the Appellate Court's incredulity at the nature of the Trustees' complaint, federal courts have long recognized the right of trustees to seek instructions and guidance in the interpretation of trust instruments. *See Redmond v. Commerce Trust Co.*, 144 F.2d 140, 154 (8th Cir.), *cert. denied*, 323 U.S. 776 (1944), *reh'g denied*, 323 U.S. 819 (1945); *Smithson v. Callahan*, 141 F.2d 13 (D.C. Cir. 1944); *Dennis v. Rhode Island Hosp. Trust Nat'l Bank*, 571 F. Supp. 623, 636 (D.R.I. 1983), *aff'd in part, modified in part on other grounds*, 744 F.2d 893 (1st Cir. 1984); *National Bank of Topeka v. Graham*, 156 F. Supp. 471 (D. Md. 1957). In fact, federal courts frequently entertain declaratory judgment actions in which trustees seek instructions and advice. *American Tel. and Tel. Co. v. Merry*, 592 F.2d 118 (2d Cir. 1979); *In re Lummis' Estate*, 118 F. Supp. 436 (D.N.J. 1954); *Washington Loan & Trust Co. v. Lyon*, 98 F. Supp. 320 (D.D.C. 1951).[15]

Jurisdictional concerns are no barrier to obtaining judicial instructions in federal court when diversity jurisdiction is alleged. *See In re Lummis' Estate*, 118 F. Supp. 436, 439 (D.N.J. 1954). The Appellate Court recognized that diversity jurisdiction exists in this lawsuit, A-5, and that New York provides the decisional law for those issues which do not involve federal questions. A-12. Thus, the Appellate Court's search for a jurisdictional basis need go no further than the law of New York, which specifically authorizes trustee actions for judicial instructions. *See In re Davies*, 148 Misc. 2d 37, 559 N.Y.S.2d 933 (Sur. Ct. 1990); *In re Jacobs*, 127 Misc. 2d 1020, 487 N.Y.S.2d 992 (Sur. Ct. 1985); *City Bank Farmers Trust Co. v. National Cuba Hotel Corp.*, 283 A.D.2d 868, 133 N.Y.S.2d 8 (App. Div. 1954) (jurisdiction founded on both the ability to render declaratory judgments and the traditional jurisdiction of a court of equity to entertain suits for instructions to guide trustees in the

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[15] Trustee lawsuits for instructions overcome direct case or controversy challenges in state courts. *See, e.g., Adams v. Farlow*, 516 So. 2d 528 (Ala. 1987), *cert. denied*, 485 U.S. 1010 (1988). *See also Himmelfarb v. Horwitz*, 536 A.2d 86 (App. D.C. 1987); *Trustees of Rutgers College v. Richman*, 41 N.J. Super. 259, 125 A.2d 10 (1956).

performance of their duties and the exercise of their powers); *In re Continental Bank and Trust Co.*, 82 N.Y.S.2d 214 (Sup. Ct. 1948).

"Trustees are especially helped by the declaratory proceeding, because they thereby obtain the protection of a judgment before acting and have occasionally been advised by the courts, after having, to their regret, assumed risks, that the precaution of a declaratory judgment might have saved them both risk and loss." *Trustees of Rutgers College v. Richman*, 41 N.J. Super. 259, 125 A.2d 10, 25 (1956). What the Trustees seek in this case is neither unusual nor unreasonable. It is what trustees have come to expect from the courts, and what the courts have routinely granted to them.

In *Redmond v. Commerce Trust Co.*, 144 F.2d 140, 154 (8th Cir.), *cert. denied*, 323 U.S. 776 (1944), *reh'g denied*, 323 U.S. 819 (1945), the Eighth Circuit recognized that "[t]here can be no doubt of the power and the right of [the trustee] to seek the instructions of a proper court of equity . . . . " *Id.* at 154. The court noted that "while [the trustee] might have put its own construction upon the indenture and gone ahead in reliance thereon, yet it would have proceeded at its peril and would have been liable to interested parties injured by a misconstruction. [The trustee] was not compelled to take this risk." *Id. See Dennis v. Rhode Island Hosp. Trust Nat'l Bank*, 571 F. Supp. 623, 624 (D.R.I. 1983), *aff'd in part, modified in part on other grounds*, 744 F.2d 893 (1st Cir. 1984) (a trustee may obtain the instructions of the court where necessary for its protection); *Old Colony Trust Co. v. City of Wichita*, 123 F. 762 (D. Kan. 1903), *modified*, 132 F. 641 (8th Cir. 1904) (a trustee has the power, and it is his duty whenever the necessity arises, to invoke the aid of a court of equity); *Guardian Trust Co. v. White Cliffs Portland Cement & Chalk Co.*, 109 F. 523 (W.D. Ark. 1901) (the trustee had the right, and it was its duty, to come to a court of equity for aid or instruction in conserving the property of the trust); *Phinizy v. Augusta & Ky. Ry.*, 56 F. 273 (C.C.S.C. 1893) (a trustee can always come into a court of equity for aid or instruction).

That the Trustees acted in accordance with widely-accepted practice when they sought a judicial determination of these issues is underscored by the literature in the field. According to Robert L. Landau, a recognized authority on corporate trust

administration, when an indenture trustee is unclear about whether a default has occurred,

> the trustee should consider the possibility of instituting a declaratory judgment action against the obligor in federal court, seeking a judicial determination of whether a default has in fact occurred. Thus, the trustee may be able to avoid future litigation, either by the obligor or the security holders, for it will have received judicial approval of its action or nonaction.

R. LANDAU, CORPORATE TRUST ADMINISTRATION AND MANAGEMENT, p. 177-78 (3d ed. 1985).

Similar advice has been offered by others. *See* Schreiber & Wood, *Caveat Indenture Trustee: Avoiding the Expanding Scope of Sutton's Law,* 121 TRUSTS AND ESTATES 48, 56 (January 1982). In fact, some commentators and courts view the option to seek judicial instructions as a right. *See* R. BOWERS, THE LAW OF BONDS AND BOND SECURITIES § 1046 (4th ed. 1935). *See also* McCollom, *The Securities And Exchange Commission And Corporate Trustees*, 36 COLUM. L. REV. 1197, 1209 n.42 (1936); IIIA A. SCOTT & W. FRATCHER, SCOTT ON TRUSTS § 259, at 406-07 (4th ed. 1988); RESTATEMENT (SECOND) OF TRUSTS § 259 (1959); G. BOGERT, TRUSTS AND TRUSTEES § 559 (2d ed. 1980).

The Appellate Court charged that "[p]aralyzed by indecision, the Trustees searched for someone to make their decision for them." A-4. To the contrary, what the Trustees seek is the type of relief to which courts and other authorities have long recognized that trustees are entitled — judicial interpretation of trust instruments. The Appellate Court acted against this overwhelming weight of authority when it ruled that the Trustees must act without an adjudication of their rights. Such an anomalous decision must not be permitted to stand as an obstacle to these or other indenture trustees.

E. The Appellate Court's Opinion Exalts Form Over Substance

The Appellate Court cynically referred to the Trustees' description of their dilemma as "a quandary the likes of Scylla and Charybdis," A-3, and then created such quandary by ruling

that the Trustees were required to assert a belief without the benefit of information necessary to formulate one. At least one court recognized this typical trustee "Scylla and Charybdis" quandary by name and held that the declaratory judgment procedure affords relief in such circumstances. *In re Badenhop's Estate*, 61 N.J. Super. 526, 161 A.2d 318, 322 (1960). In ruling that an actual controversy was presented by a petition for construction of a will, the *Badenhop* court aptly noted that "the day when technical considerations are given merit has long passed into the limbo." 161 A.2d at 322. *Cf. Fort Wayne Community Schools v. Fort Wayne Educ. Ass'n*, 735 F. Supp. 907, 910 (N.D. Ind. 1990) (refusing to substitute semantic distinctions for substantive realities, the court held that because the school district faced the threat of litigation if it acted improperly, a controversy was presented, even though both parties desired the same outcome). In the instant case, the Trustees have been sued once, and as the Appellate Court noted, they face potential liability for any decision they might make without a judicial determination of their rights. It is for this reason that the protection of a declaratory judgment is vital to the Trustees.

Despite these compelling circumstances, the Appellate Court held that unless the Trustees stated whether they believe there has been a default under the Indentures, there can be no case or controversy. A-5-9. The Trustees have been unable to locate a single analogous reported case in which such a requirement was imposed on the litigants. Thus, the decision of the Appellate Court appears to stand alone in issuing an unconditional mandate that trustees seeking a declaratory judgment take a position in their pleadings.[16] Apparently, if the Trustees had

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[16] The Appellate Court also complained that "not one of [the cases the Trustees cited] allowed a party to litigate without taking a position." A-7. The Trustees respectfully point out that many reported opinions, including those cited in the Trustees' briefs to the Appellate Court, do not specify whether a position was taken in the pleadings. *See, e.g., John Hancock Mut. Life Ins. Co. v. Webcor, Inc.*, 311 F.2d 701 (7th Cir. 1962); *Keener Oil & Gas Co. v. Consolidated Gas Util. Corp.*, 190 F.2d 985 (10th Cir. 1951); *Delaney v. Carter Oil Co.*, 174 F.2d 314 (10th Cir.), *cert. denied*,

(footnote continues)

stated, "we believe there has been a default under the terms of the Indentures, please tell us whether we are right," instead of, "we do not know whether there has been a default," the Appellate Court would have held that a justiciable controversy is presented in this case. The notion that justiciability turns on such a formalistic distinction is wholly inconsistent with modern rules of pleading and procedure. *See, e.g., United States Fidelity & Guar. Co. v. Pierson*, 97 F.2d 560, 562 (8th Cir. 1938); *Fort Wayne Community Schools v. Fort Wayne Educ. Ass'n*, 735 F. Supp. at 910; *In re Badenhop's Estate*, 161 A.2d at 322. *See also Kunkel v. Continental Casualty Co.*, 866 F.2d 1269, 1274 (10th Cir. 1989) (the Declaratory Judgment Act contemplates a pragmatic approach).

In *Aetna Life*, 300 U.S. 227, this Court stated that "it is the nature of the controversy, not the method of its presentation or the particular party who presents it, that is determinative." *Id.* at 244. The present case meets all substantive criteria for case or controversy. The nature of the controversy presented in this case is adversarial. The holders of almost a majority of debt outstanding in one of the two issues expressed the belief that a default occurred. E-II disagrees. The Trustees, who lack access to essential information, have an urgent need to determine who is correct, in order that they may take actions which are appropriate in the circumstances. The parties would not be any more adverse, nor the controversy any more immediate if the Trustees set forth in a complaint their suspicions. Clearly, by filing the complaint, the Trustees have demonstrated that they take seriously the contentions of the holders, and that they believe there is a reasonable basis for concluding that a default occurred.

To impose an artificial requirement that the Trustees reveal their beliefs about the issues they are presenting is to deprive them and others similarly situated of the fundamental benefit of the

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(footnote continued)

338 U.S. 824 (1949); *Fine v. Property Damage Appraisers, Inc.*, 393 F. Supp. 1304 (E.D. La. 1975); *City Bank Farmers Trust Co. v. National Cuba Hotel Corp.*, 283 A.D.2d 868, 133 N.Y.S.2d 8 (App. Div. 1954) (trustee sought a "declaration as to whether any sums are payable" pursuant to a trust agreement, and that "if " the court determined that such sums were owing, to direct the payment of the sums to the trustee).

declaratory judgment procedure—protection from liability while ascertaining the extent of one's rights and obligations. In order to enjoy this benefit, the Trustees must have access to the courts without stating in advance whether they believe E-II breached the covenants contained in the Indentures.

II

REVIEW IS WARRANTED BECAUSE THE APPELLATE COURT'S RULING ON THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING MISINTERPRETS NEW YORK LAW

The Appellate Court imposed on the Trustees the unreasonable burden of stating in their pleadings whether they believe a default has taken place, and then ruled that the Trustees must make their decision without the benefit of any information from E-II that might shed light on the issue. The path the Appellate Court took to reach this incongruous decision was to first recognize that New York law applies to the Indentures and that every contract governed by New York law contains an implied covenant to perform the contract fairly and in good faith, but then to conclude that such implied covenant may only benefit unsophisticated investors. A-12-16. It is respectfully submitted that such decision is not only unworkable, it is incorrect.[17]

The case of *Metropolitan Life Ins. Co. v. RJR Nabisco, Inc.*, 716 F. Supp. 1504 (S.D.N.Y. 1989), contains a thorough analysis of the law of New York on the implied covenant of good faith and fair dealing. Even though the court denied the requested relief in that case, its analysis supports the Trustees' position in the present case.

In *Metropolitan Life*, the court began with the proposition that the issue of whether an implied covenant has been violated surfaces when "one party has . . . effectively deprived the other of those express, explicitly bargained-for benefits." 716 F. Supp.

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[17] Also incorrect is the assumption that only the most sophisticated institutional investors hold the debt securities at issue in this case. Although the list of holders includes financial institutions, it also includes unsophisticated, individual investors.

at 1517. In reaching its decision on this issue, the court described the factors to be considered in such an inquiry. First, the court must read an implied covenant of good faith and fair dealing into an indenture to ensure that neither party deprives the other of "the fruits of the agreement." *Id.* (citing *Greenwich Village Assoc. v. Salle*, 110 A.D.2d 111, 115, 493 N.Y.S.2d 461, 464 (App. Div. 1985); *Van Gemert v. Boeing Co.*, 553 F.2d 812, 815 (2d Cir. 1977)). *Accord Hartford Fire Ins. Co. v. Federated Dep't Stores*, Inc., 723 F. Supp. 976, 991 (S.D.N.Y. 1989). The law implies those covenants which are "consistent with other mutually agreed upon terms in the contract." *Id.* (quoting *Sabetay v. Sterling Drug, Inc.*, 69 N.Y.2d 329, 335, 514 N.Y.S.2d 209, 212 (1987)).

> Viewed another way, the implied covenant of good faith is breached only when one party seeks to prevent the contract's performance or to withhold its benefits. *See Collard v. Incorporated Village of Flower Hill*, 75 A.D.2d 631, 632, 427 N.Y.S.2d 301, 302 (2d Dep't 1980) [*aff'd*, 52 N.Y.2d 594, 439 N.Y.S.2d 326 (1981)]. As a result, it thus ensures that parties to a contract perform the substantive, bargained-for terms of their agreement. *See, e.g., Wakefield v. Northern Telecom, Inc.*, 769 F.2d 109, 112 (2d Cir. 1985) (Winter, J.).

Metropolitan Life, 716 F. Supp. at 1517. Thus, the covenants implied in indentures are those which are consistent with the express terms of the indentures. *Id.* (citing *Gardner & Florence Call Cowles Foundation v. Empire, Inc.*, 589 F. Supp. 669, 673 (S.D.N.Y. 1984), *vacated on procedural grounds*, 754 F.2d 478 (2d Cir. 1985) (quoting *Broad v. Rockwell Int'l Corp.*, 642 F.2d 929, 957 (5th Cir.) (en banc), *cert. denied*, 454 U.S. 965 (1981)).

The court then examined cases such as *Van Gemert v. Boeing Co.*, 520 F.2d 1373 (2d Cir.), *cert. denied*, 423 U.S. 947 (1975), *appeal after remand*, 553 F.2d 812 (2d Cir. 1977), and *Pittsburgh Terminal Corp. v. Baltimore & Ohio R.R.*, 680 F.2d 933 (3d Cir.), *cert. denied*, 459 U.S. 1056 (1982), and found that the courts deciding those cases used the implied covenant of good faith and fair dealing to ensure that the bondholders received the benefit of their bargains. In *Van Gemert*, there was an express provision requiring that notice be given to bondholders, but the means by which it was to be given

were not spelled out. In order to remedy the situation, "through an implied covenant, the court fleshed out the full extent of the more skeletal right that appeared in the contract itself, and thus protected plaintiff's bargained-for right of conversion." *Metropolitan Life*, 716 F. Supp. at 1517.

From all of this, the *Metropolitan Life* court determined that the appropriate analysis is first to examine the indentures to determine "the fruits of the agreement" between the parties, and then to decide whether these "fruits" have been "spoiled." If they have, then the contractual rights have been violated. *Metropolitan Life*, 716 F. Supp. at 1518.

The court concluded that the facts presented in the *Metropolitan Life* case did not give rise to the requested relief, as the "fruits" of the indentures at issue therein did not include the implied restrictive covenant that the plaintiffs were seeking. This conclusion was reached after the court had thoroughly examined all relevant facts surrounding the transactions, including one of the plaintiff's memorandum which anticipated precisely the type of risks to their investments from which they sought judicial protection. In other words, the *Metropolitan Life* plaintiffs, who were all sophisticated institutional investors, were seeking to impose restrictions that were inconsistent with the express terms of the contractual documents as well as the pre-contractual understanding of the parties. By contrast, the Trustees in this case, who represent all holders of the Notes and Debentures, which include investors of all levels of sophistication, are merely seeking to enforce the provisions of the Indentures by obtaining an adjudication concerning their express terms, as well as all implied covenants that are consistent with such express terms.

In the present case, the Trustees seek to obtain for the holders the "fruits" of their bargain with E-II. All the Trustees are seeking by the enforcement of the implied covenant of good faith and fair dealing is that the court "flesh out the more skeletal right" that appears in the text of the Indentures. Such an implied covenant does exist; it can and should be enforced to effectuate the purpose of the Indentures and the Trust Indenture Act. 15 U.S.C. §§ 77aaa *et seq.* A fundamental purpose of that legislation is to transform the indenture trustee into "an active trustee lest the

interests of investors be neglected both prior to and subsequent to default." *Securities and Exchange Commission Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective And Reorganized Committees: Trustees Under Indentures* at 70 (May 14, 1937). *See also id.* at 110. Accordingly, the implied covenant of good faith and fair dealing should be enforced in this case in order that the holders of $1.5 billion in unsecured corporate debt may enjoy the benefit of their bargain.

III
CONCLUSION

By imposing unreasonable, formalistic conditions on the case or controversy requirement which place declaratory judgments out of reach for indenture trustees, the Appellate Court's decision directly contravenes settled principles of law. By imposing such restrictions while at the same time foreclosing all opportunities to obtain information, the Appellate Court's decision makes it virtually impossible for protection to be afforded debt security holders when the existence of a default is in question by these Trustees and untold numbers of trustees acting under indentures with similar provisions. By imposing these inconsistent conditions and dismissing this case with prejudice rather than remanding with leave to amend the complaint, the Appellate Court revealed that its priority is to stem a perceived tide of trustee cases in federal court. A-10. Whereas the Appellate Court deemed the vision of trustees without judicial guidance to be "unpleasant," while it confessed to finding more disturbing the vision of trustee after trustee marching through its doors, it is respectfully submitted that the most disturbing vision of all is one in which considerations of precedent become secondary to that of shutting the courthouse door to those who traditionally have been deemed appropriate for entry. Such a decision works an injustice that harms not only the litigants in this case, but all who must live under this rule.

Therefore, petitioners Harris Trust and Savings Bank, as Trustee, and LaSalle National Bank, as Trustee, respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX 1

Opinion of the United States Court of Appeals in *Harris Trust and Savings Bank v. E-II Holdings, Inc.*, 926 F.2d 636 (7th Cir. 1991)

HARRIS TRUST AND SAVINGS BANK, an Illinois banking corporation, not individually but as Trustee, and LaSalle National Bank, a national banking association, not individually but as Trustee, Plaintiffs-Appellants,

v.

E-II HOLDINGS, INCORPORATED, a Delaware corporation, and American Brands, Incorporated, a Delaware corporation, Defendants-Appellees.

No. 90-1095.

United States Court of Appeals,
Seventh Circuit.

Argued Oct. 30, 1990.

Decided Feb. 21, 1991.

Rehearing and Rehearing In Banc
Denied May 3, 1991.

Before WOOD, Jr., COFFEY, and KANNE, Circuit Judges.

HARRINGTON WOOD, Jr., Circuit Judge.

Technically, they are high yield debt securities, but in common parlance we call them junk bonds. It is an unflattering and unwelcome appellation, due in no small part to the fact that oftentimes the securities are, quite literally, junk. *See* Kuhn, *Junk: The Weak and the Strong,* FORTUNE, Oct. 23, 1989, at 17. The appellants, trustees of high yield debt securities with a face value of $1.5 billion, are before this court in an attempt to assuage their fears that the worst has occurred. We cannot provide the reassurance they seek, however; we lack subject matter jurisdiction over most of the complaint and the remainder fails to state a claim.

The facts are straightforward and, for purposes of this decision, undisputed.[1] In 1987, BCI Holdings Corp. ("BCI") engineered a $6.2 billion leveraged acquisition of Beatrice Companies, Inc. ("Beatrice"). During the reshuffling that ensued, BCI created E-II Holdings, Inc. ("E-II"), and capitalized it with an initial portfolio of fifteen business concerns that were once part of Beatrice. Soon thereafter, E-II made a registered public offering of $1.5 billion in high yield debt securities: $750,000,000 of 12.85% senior subordinated notes and $750,000,000 of 13.05% subordinated debentures. The trustee under the note indenture was Harris Trust and Savings Bank ("Harris"). The trustee under the debenture indenture[2] was LaSalle National Bank ("LaSalle") (collectively, the "Trustees").

E-II was not immune to the takeover mania that victimized the 1980s, and in December 1987 it launched a hostile takeover bid for American Brands, Inc. ("American Brands"). American Brands countered with a bid for E-II—the so-called "pac man" defense. And when the dust settled, it was American Brands, and not E-II, that prevailed.

Following its unsuccessful takeover attempt, E-II was involved in a number of business transactions that gave rise to uneasiness on the part of the Trustees. For example, on February 29, 1988, E-II became a wholly owned direct subsidiary of American Brands. On July 1, 1988, American Brands sold E-II to McGregor Acquisition Corp. ("McGregor").[3] And one day after that sale, McGregor made a "capital contribution" to E-II of all of the issued and outstanding stock of its subsidiary, Faberge, Inc. ("Faberge"), in exchange for 840 shares of E-II and a "dividend" of $925,000,000. In all, the Trustees have concerns about some fourteen different transactions (the parties refer to them as

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[1] A more detailed description of the facts may be found in the district court opinion. *See Harris Trust & Sav. Bank v. E-II Holdings, Inc.*, 722 F.Supp. 429 (N.D.Ill.1989).

[2] The note indenture and the debenture indenture (collectively, the "Indentures") are identical with respect to all relevant matters in this suit.

[3] McGregor is a subsidiary of the Riklis Family Corporation.

"Extraordinary Transactions") occurring between February and December of 1988.

The Trustees were not alone in their concern. A significant number, though not a majority, of investors filed notices of default with the Trustees during the summer and fall of 1988. These notices alleged that a default had occurred because the transaction involving Faberge was in violation of the Indentures.[4]

The Trustees sought to quell their own concerns, as well as those of the investors, by going directly to the source. In addition to the officers' certificates and opinions of counsel required under the Indentures, the Trustees demanded that E-II provide additional information about the Extraordinary Transactions. In particular, the Trustees asked E-II to disclose the factual information on which the certificates and opinions were based. E-II was not accommodating, however; it provided the certificates and opinions required under the Indentures but did not disclose the factual bases of those certificates and opinions. E-II refused to provide the additional information on the ground that the Indentures did not provide such a right.[5]

In the Trustees' view, E-II's failure to cooperate placed them in a quandary the likes of Scylla and Charybdis. If they acted immediately and declared E-II in default, then the declaration could trigger cross-default provisions in other loan agreements and thereby catapult E-II into involuntary bankruptcy. And if it was later discovered that the Trustees were wrong and

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[4] Under section 6.01(3) of the Indentures, a "Default" occurs if E-II "fails to comply in any respect with any of its other agreements contained in the Securities or this Indenture." This "Default" does not become an "Event of Default" (allowing the Trustees to accelerate payment, etc.) until E-II (1) receives written notice from the Trustees or a majority of the investors and (2) fails to correct the Default within 30 days of receiving the notice. Indentures § 6.01.

[5] E-II apparently would have provided some of the information on a confidential basis, but the Trustees did not believe that their fiduciary duties would allow them to withhold information from the investors and they declined E-II's offer.

that E-II had not been in default, then the disgruntled investors would likely sue the Trustees. On the other hand, the Trustees were also amenable to suit if they failed to act and the investors later discovered that, in fact, E-II's actions had breached the Indentures' covenants. Neither course of action seemed prudent in view of what the Trustees perceived as the insufficient nature of the information in their possession.

Paralyzed by indecision, the Trustees searched for someone to make their decision for them. On January 10, 1989, the Trustees filed a declaratory judgment action against E-II and asserted that the following issues were "matter[s] in dispute."[6]

a. Whether the acquisition of E-II by American Brands was in compliance with the terms of the Indentures and principles of applicable law and equity, including the implied covenants of good faith and fair dealing;

b. Whether the post-acquisition Extraordinary Transactions . . . were in compliance with the terms of the Indentures and principles of applicable law and equity, including the implied covenants of good faith and fair dealing;

c. Whether E-II has complied with the provisions of the [Trust Indenture Act ("Act"), 15 U.S.C. §§ 77aaa-bbbb,] including but not limited to Section 314, [*id.* § 77nnn,] which requires evidence of compliance with indenture provisions;

d. Whether an Event of Default has occurred on the Notes or the Debentures within the meaning of Section 315 of the [Act, 15 U.S.C. § 77ooo];

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[6] In an additional count, the Trustees sought indemnification for their costs and attorneys' fees for bringing the action and for their costs in administering the trusts. E-II sought dismissal on the ground that the count provided no indication of a controversy, the Trustees failed to respond to E-II's argument, and the district court granted the motion and dismissed the count on the basis of that failure. On appeal, the Trustees make mention of this count but do not otherwise contest the decision below, a course of conduct that we interpret to mean that the Trustees are not appealing this portion of the district court's order.

e. What action the Trustees should take with respect to the Notices of Default . . . received . . . ;

f. Whether or not the assets remaining in E-II are sufficient to generate sufficient revenues to ensure payment of principal, interest, and sinking fund obligations of the Notes and Debentures;

g. Whether any future asset sales by E-II can be permitted and, if so, under what circumstances; and

h. To what information are the Trustees entitled in order to determine if unusual occurrences, such as the Extraordinary Transactions, violate the terms of the Indentures.

The Trustees closed their complaint with a request for a judicial declaration concerning each of these "matter[s] in dispute."[7]

E-II,[8] however, and subsequently the district court, were hard pressed to determine the Trustees' positions with respect to the alleged "matter[s] in dispute." And in fact, the Trustees had failed to take a position with respect to virtually every one of the issues for which they sought a judicial declaration. The Trustees did argue that they were entitled to more information than E-II was giving them (the eighth "matter in dispute"), but otherwise peppered their submissions with qualifiers—"may," "could," and other verbalisms that failed to indicate a stance.

On E-II's motion to dismiss under rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, the district court held that it had no subject matter jurisdiction to decide those issues for

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[7] The Trustees' complaint stated that jurisdiction was premised on diversity of citizenship as well as the notion that section 322 of the Act, 15 U.S.C. § 77vvv, provided a private right of action. In light of the fact that complete diversity of citizenship exists between the plaintiffs and the defendants, we do not address the argument that the Act gives rise to a private cause of action.

[8] The initial complaint listed only E-II as a defendant. Later, American Brands became a party defendant after the district court granted its motion to intervene. The interests of E-II and American Brands on this appeal do not appear to diverge and, for convenience, future references to E-II shall also include American Brands.

which the Trustees failed to take a position. That failure, the district court concluded, precluded jurisdiction because it evidenced the lack of a case or controversy. As to the dispute over the Trustees' entitlement to additional information, the district court concluded that a case or controversy existed because the parties disputed the quantity and quality of disclosure required of E-II. The district court then found no legal basis to support the Trustees' claim that they were entitled to more information than E-II was willing to disclose. As such, it dismissed the request for information on the ground that it failed to state a cause of action. The district court also denied a subsequent motion by the Trustees to alter or amend the judgment.

On appeal, the Trustees continue to assert that it is neither necessary nor appropriate for them to commit to a position. Indeed, they assert that their request for "judicial guidance" and "judicial instruction" is the paradigm on which all declaratory judgment cases are built. And in so doing, they seal their fate: "Frequently, an issue of this sort will come before [this court] clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change . . . is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf."[9]

As a predicate to relief, the Declaratory Judgment Act requires that the case be one of "actual controversy." 28 U.S.C. § 2201(a). That predicate, which tracks the "cases" or "controversies" requirement of article III, saves the statute from unconstitutionally expanding the federal courts' jurisdiction. *See Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617 (1937) (upholding Act); U.S. CONST. art. III, § 2.[10] The often

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[9] *Morrison v. Olson*, 487 U.S. 654, 699, 108 S.Ct. 2597, 2623, 101 L.Ed.2d 569 (1988) (Scalia, J., dissenting).

[10] As the Supreme Court pointed out in *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S.Ct. 510, 512, 85 L.Ed. 826 (1941):

> The difference between an abstract question and a "controversy" contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible,

(footnote continues)

unspoken, but yet obvious, corollary of the "actual controversy" predicate is that the dispute must exist *between the parties to the declaratory judgment action. See Aetna Life*, 300 U.S. at 242, 57 S.Ct. at 464 ("There is here a dispute between parties who face each other in an adversary proceeding.").

And if *Aetna Life* and common sense were not enough of a guide, the Supreme Court squarely rejected the Trustees' argument in *Princeton Univ. v. Schmid*, 455 U.S. 100, 102 S.Ct. 867, 70 L.Ed.2d 855 (1982) (per curiam).[11] In *Schmid*, the appellee was convicted and fined by a New Jersey trial judge, but his conviction was reversed by the state supreme court. Princeton University, an intervenor in the proceedings before the state supreme court, sought review before the Supreme Court. The state of New Jersey also requested review but opined that New Jersey " 'deems it neither necessary nor appropriate to express an opinion on the merits of the respective positions of the private parties to this action.' " *Id.* at 102, 102 S.Ct. at 868. The Court, warning that it did not sit "to give advisory opinions about issues as to which there are not adverse parties before [it]," held that New Jersey's presence in the case did not provide a basis for subject matter jurisdiction over the appeal. *Id.*[12]

(footnote continued)

> to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

[11] The Trustees (and E-II, for that matter) failed to bring *Schmid* to our attention. Of those cases that the Trustees did bring to our attention, not one of them allowed a party to litigate without taking a position.

[12] In an attempt to compensate for their own failure to take a position, the Trustees argue that they have standing to raise issues on behalf of "certain Holders" and point to the fact that their complaint alludes to the position of that undefined grouping. Our jurisdictional analysis does not begin and end with the question of standing, however.

(footnote continues)

Like the state of New Jersey in *Schmid*, the Trustees have declined to express an opinion on the merits.[13] And as in *Schmid*, that failure evidences the lack of a case or controversy and, therefore, the lack of subject matter jurisdiction. *Schmid* is dispositive on this issue, and the district court's dismissal under rule 12(b)(1) was proper.[14]

(footnote continued)

The Trustees and E-II are the only parties to this suit and the Trustees, regardless of the capacity in which they appear, have failed to establish a dispute *between the parties* as to a majority of the "matter[s] in dispute."

The Trustees also make arguments concerning the importance of the issues that are before this court, and they miss few opportunities to emphasize the dollar value of the securities involved. Yet their pleas are unavailing. The entire premise of article III and the body of precedent interpreting that provision is that federal courts should not make rulings merely because the underlying issues are interesting or important. Federal courts decide cases and controversies, and the majority of the issues presented by the Trustees, regardless of their importance to modern society, do not arise within the context of a case or controversy.

[13] Indeed, the Trustees continually lament that they do not have sufficient information to allow them to take a position.

[14] The Trustees' complaint is also troublesome for additional reasons. For example, the complaint fails to allege the injury that the Trustees or investors have sustained or are in immediate danger of sustaining, thereby failing to indicate standing to seek a declaratory judgment. *See Vickers v. Henry County Sav. & Loan Ass'n*, 827 F.2d 228, 231-32 (7th Cir.1987). Moreover, the Trustees request a determination of whether, and under what circumstances, future asset sales may be permitted. This request, premised on pure speculation as to what the future might hold, is akin to a hypothetical question asked by a law school professor; it does not raise issues that are ripe for judicial determination. *See Aetna Life*, 300 U.S. at 241, 57 S.Ct. at 464 (federal court may not issue opinion "advising what the law would be upon a hypothetical state of facts"). As such, the Trustees' counsel (or a law school professor) may attempt to answer this question, but a federal court should not. J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE § 57.12, at 57-113 (2d ed. 1948 & Supp.1990-91) ("The [Declaratory Judgment] Act is not designed to eliminate the function of attorneys.") (citing *Hendrix v. Poonai*, 662 F.2d 719 (11th Cir.1981)); *see also Fitzgerald v. McChesney*, 336 F.2d 905, 910

(footnote continues)

As a side note, we are not unmindful of the judicial maxim that the "law ought not make trusteeship so hazardous that responsible individuals and corporations will shy away from it." *Dabney v. Chase Nat'l Bank*, 196 F.2d 668, 675 (2d Cir.1952) (Hand, J.), *cert. dismissed*, 346 U.S. 863, 74 S.Ct. 102, 98 L.Ed. 374 (1953). That maxim, however, does not extend our jurisdiction. And as should be self-evident, the requirements of article III are not met when parties merely allege, as the Trustees have effectively done here, that they are " 'at a loss to know what course to pursue.' "[15] In our view, the vision of trustees without judicial guidance, however unpleasant, is eclipsed by a more disturbing vision—trustee after trustee (as well as those in analogous positions) coming into federal court and pleading, "We do not know what to do, Judge. Give us some instruction."[16]

(footnote continued)

(D.C.Cir.1964) (Declaratory Judgment Act "was never intended as a device for relegating to the courts responsibilities reposed initially in private parties").

[15] J. MOORE & J. LUCAS, *supra*, § 57.12, at 57-112 to -113 (quoting *M & M Transp. Co. v. U.S. Indus., Inc.*, 416 F.Supp. 865 (S.D.N.Y.1976)); *see also Crowley Cutlery Co. v. United States*, 849 F.2d 273, 276 (7th Cir.1988) ("You cannot go to a federal court for advice on the legality of a proposed course of action. You must be a party to an existing legal dispute.").

Although the Trustees dispute the charge that they are asking the court to do all of their work, one need look no further than their fifth "matter in dispute" for sufficient evidence to support the charge.

[16] For purposes of clarification, one should not imply from our holding that the Trustees must declare a default under the Indentures before their claim will be justiciable. As we read it, the heart of the Trustees' complaint seeks an interpretation of the Indentures, not a declaration that a default has occurred. As such, we would analyze it in a manner similar to the Trustees' claim that they are entitled to more information than E-II is willing to disclose, a claim for which we find subject matter jurisdiction; we have not required the Trustees to declare E-II in default before filing that request for an interpretation of the Indentures.

(footnote continues)

The only issue in the Trustees' complaint that does appear to present a case or controversy is the dispute over the quantity and quality of information that the Trustees are entitled to receive from E-II. This dispute fails to clear a different hurdle, however; the Trustees have not put forth a cognizable legal basis under which they might be entitled to the information that they seek. *See* FED.R.CIV.P. 12(b)(6). Of the three bases offered—express covenant, implied covenant, and the Act—not one can support the Trustees' demand for additional information.[17]

The first potential basis for relief—the express language of the Indentures—is a latecomer to this litigation; the Trustees failed to raise this argument until they filed a motion to alter or amend the judgment. Prior to that time, in their response to E-II's motion to dismiss, the Trustees had candidly stated:

(footnote continued)

While the relief requested as to the eighth "matter in dispute" is in some sense hypothetical (in that the Trustees need not declare a default if the court determined that E-II's actions were not in compliance with the Indentures), we would note that all declaratory relief is in some sense hypothetical. *NBA v. SDC Basketball Club, Inc.*, 815 F.2d 562, 566 n. 2 (9th Cir.1987), *cert. denied*, 484 U.S. 960, 108 S.Ct. 362, 98 L.Ed.2d 386 (1987). The more important consideration is whether the case "presents a sufficiently concrete case and controversy upon which relief properly may be fashioned." *Id.* And we believe, under the facts as presented to us, that the issues presented by the eighth "matter in dispute" are sufficiently concrete and ripe for review; we can think of no useful purpose that would be served by requiring the Trustees to send E-II a notice of default before filing the complaint. On the contrary, requiring the Trustees to file a notice of default could trigger cross-default provisions in other loan agreements and needlessly force E-II into involuntary bankruptcy.

[17] This claim may be dismissed under rule 12(b)(6) only if the Trustees can prove no set of facts upon which relief may be granted. *Bethlehem Steel Corp. v. Bush*, 918 F.2d 1323, 1326 (7th Cir.1990). As always, the standard of review for dismissals under rule 12(b)(6) is de novo. *Id.* Further, we assume that all well-pleaded allegations are true and shall draw all reasonable inferences in the light most favorable to the Trustees. *Id.*

"Obtaining the information the Trustees have requested, though not expressly mentioned in the Trust Indentures, is not inconsistent with their provisions. . . . " And after reading this statement, the district court found that the "Trustees admit[ted] that there is no specific provision in the Indentures entitling them to the information they request."

Setting aside the issue of whether the Trustees have made a binding admission, the Trustees' statement indicates a conscious, deliberate waiver of a legal argument. *See Farnham v. Windle*, 918 F.2d 47, 51 (7th Cir.1990) (failure to raise legal argument in opposition to motion to dismiss results in waiver). Having waived the argument, the Trustees could not thereafter raise it in a motion to alter or amend the judgment. The district court analyzed and rejected the belated argument that section 11.05 of the Indentures[15] expressly provided a right to the information sought, but it was not required to make such an effort. Motions to alter or amend a judgment "cannot be used to raise arguments which could, and should, have been made before the judgment issued," *FDIC v. Meyer*, 781 F.2d 1260, 1268 (7th Cir.1986); *see Dahnke v. Teamsters Local 695*, 906 F.2d 1192, 1196 n. 3 (7th

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[15] Section 11.05 states:

> Each certificate or opinion with respect to compliance with a condition or covenant in this Indenture shall include:
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> (1) a statement that the person making such certificate or opinion has read such covenant or condition;
>
> (2) a brief statement as to the nature and scope of the examination or investigation upon which the statements or opinions contained in such certificate or opinion are based;
>
> (3) a statement that, in the opinion of such person, he has made such examination or investigation as is necessary to enable him to express an informed opinion as to whether or not such covenant or condition has been complied with; and
>
> (4) a statement as to whether or not, in the opinion of such person, such condition or covenant has been complied with, and such other opinions as the Trustees may reasonably request; *provided, however,* that with respect to matters of fact an Opinion of Counsel may rely on an Officers' Certificate or certificates of public officials.

Cir.1990); neither the district court nor this court is obliged to examine arguments that are raised in an untimely fashion.[19]

Even if we were to reach the merits on this issue, we would feel compelled to agree with the district court. The argument that section 11.05 expressly requires E-II to provide the requested information is more wishful thinking than anything else. As the district court observed, section 11.05 is limited by its express terms to a "certificate" or "opinion." Nowhere does it require E-II to disclose the facts underlying these documents. Indeed, when more disclosure is necessary, the Indentures make express provisions for that disclosure. *See, e.g.*, Indentures § 4.07 (if E-II knows of a "Default" or "Event of Default," "the certificate shall describe any such Default or Event of Default and its status"); *Id.* § 5.01(5) (certificate shall contain a statement of compliance and have attached "arithmetic computations" demonstrating compliance with the Consolidated Interest Expense Ratio).

The second potential basis for relief—the implied covenant of good faith and fair dealing—presents a more difficult question. The parties agree that New York law applies and that every contract governed by New York law contains an implied covenant to perform the contract fairly and in good faith. *See Rowe v. Great Atlantic & Pac. Tea Co.*, 46 N.Y.2d 62, 412 N.Y.S.2d 827, 385 N.E.2d 566 (1978). The parties are in relatively sharp disagreement, however, as to what that implied covenant requires in this case.

Courts often use broad and unqualified language in describing the content of the implied covenant of good faith. *See, e.g., Metropolitan Life Ins. Co. v. RJR Nabisco, Inc.*, 716 F.Supp. 1504, 1516-18 (S.D.N.Y.1989). In contrast to their broad definitional language, however, their analyses indicate that the "party who asserts the existence of an implied-in-fact covenant bears a heavy burden." *Rowe*, 46 N.Y.2d 62, 412 N.Y.S.2d 827, 385 N.E.2d 566.

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[19] Another untimely argument is the Trustees' assertion that E-II has not even provided the "certificates" and "opinions" required under the Indentures. This challenge to the district court's factual findings was not specifically raised until the Trustees filed their reply brief, and is therefore waived. *See* 7th CIR.R. 28(f).

And from these analyses, we discern that New York law appears to invoke the implied covenant of good faith and fair dealing only in those instances where one party has violated the spirit, although not the letter, of a contract. *See Metropolitan Life*, 716 F.Supp. at 1517 (implied covenant appropriate where, while the express terms of the contract "may not have been technically breached, one party has nonetheless effectively deprived the other of those express, explicitly bargained-for benefits."); *see also Don King Prods., Inc. v. Douglas*, 742 F.Supp. 741, 767 (S.D.N.Y.1990) (implied covenant "simply 'ensures . . . ' that parties are not unfairly denied 'express, explicitly bargained-for benefits.' ") (quoting *Metropolitan Life*, 716 F.Supp. at 1517). As such, we must determine whether the Trustees are seeking to enforce "promises which a reasonable person in the position of the [Trustees] would be justified in understanding were included [in the Indentures]." *Havel v. Kelsey-Hayes Co.*, 83 A.D.2d 380, 445 N.Y.S.2d 333 (N.Y.App.Div.1981); *see also Rowe*, 46 N.Y.2d 62, 412 N.Y.S.2d 827, 385 N.E.2d 566 ("Thus, a party making such a claim must prove not merely that it would have been better or more sensible to include such a covenant, but rather that the particular unexpressed promise sought to be enforced is in fact implicit in the agreement viewed as a whole.").

For example, in *Van Gemert v. Boeing Co.*, 520 F.2d 1373 (2d Cir.), *cert. denied*, 423 U.S. 947, 96 S.Ct. 364, 46 L.Ed.2d 282 (1975), the holders of convertible debentures had an express contractual right to notice of the issuer's intent to redeem the debentures, notice that would have allowed the debenture holders to determine whether or not they wanted to exercise the conversion privilege attached to their securities. The indenture, however, did not clearly spell out the form of notice required, and the issuer gave notice that would have technically complied with the indenture but was otherwise ineffective. The court, after analyzing the matter, was unwilling to allow the issuer to hide behind the vague notice provisions in the indenture. It held that the face of the indenture specifically evidenced that the debenture holders had bargained for notice, and interpreted the indenture to require reasonable notice in the absence of more specific contractual language. Thus, the court invoked the implied covenant of good faith and fair dealing to prevent the issuer from depriving the

debenture holders of a "bargained-for" right—notice. *See also Pittsburgh Terminal Corp. v. Baltimore & O.R.R.*, 680 F.2d 933 (3d Cir.), *cert. denied*, 459 U.S. 1056, 103 S.Ct. 475, 74 L.Ed.2d 621 (1982).

In *Metropolitan Life*, the investment grade of RJR Nabisco's bonds fell after the company was the subject of a leveraged buyout. 716 F.Supp. at 1505-06. The bondholders sued, alleging that the leveraged buyout deprived them of the intended object of their contract—the purchase of investment-grade securities. The court was not impressed, however. After noting that *Van Gemert* and *Pittsburgh Terminal* protected the benefit of a bargain "as determined from the face of the contracts at issue," the court proceeded to distinguish those cases. *Id.* at 1517. The bondholders, it concluded, were seeking something quite beyond a meaningful fulfillment of the indentures' express terms.[20] Instead, the bondholders' demands appeared to be founded upon the notion that the issuer had a duty not only to comply with the indentures, but to make sure that the bondholders " 'had made a good investment.' " *Id.* at 1520 (quoting *Gardner & Florence Call Cowles Found. v. Empire, Inc.*, 589 F.Supp. 669, 674 (S.D.N.Y.1984), *vacated on procedural grounds*, 754 F.2d 478 (2d Cir.1985)). And after lengthy analysis, the district court concluded that these demands sought to create an additional benefit for which the parties had not bargained. *Id.* at 1519 ("These plaintiffs do not invoke an implied covenant of good faith to protect a legitimate, mutually contemplated benefit of the indentures; rather, they seek to have this Court create an additional benefit for which they did not bargain."); *see also Hartford Fire Ins. Co. v. Federated Dep't Stores, Inc.*, 723 F.Supp. 976 (S.D.N.Y.1989).

Here, as in *Metropolitan Life*, the relevant contracts do not support the interpretation that the Trustees now advocate. The Trustees allude to the "fruits" of the investors' bargain but fail to demonstrate, especially in light of the limited requirements of section 11.05, how a reasonable investor would be justified in

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[20] Indeed, the indentures permitted mergers and imposed no limitations on the assumption of debt.

assuming that E-II promised to disclose the factual bases underlying its certificates and opinions.[21] Indeed, their language suggests, without basis, that E-II has a continuing duty to reassure the investors that they have made a good investment—the same type of argument rejected in *Metropolitan Life*. New York law does not, as the Trustees would have us believe, imply a covenant merely on the basis of strong societal concerns; the foundation of the implied covenant is the express covenant, and the Trustees' claim simply fails to provide that foundation.

True, the Indentures do not preclude the Trustees from obtaining the information they now seek, but that does not mean that we should imply such a right of access. *See Hartford Fire*, 723 F.Supp. at 992 ("The fact that these terms appeared nowhere in the Indenture does not mean the court should now imply them to protect the parties' bargain."). "In fact, the opposite appears to be true." *Id.* As the court in *Metropolitan Life* stated:

> [T]here admittedly is not an explicit Indenture provision to the contrary of what plaintiffs now claim the implied covenant requires. That absence, however, does *not* mean that the Court should imply into those very same indentures a covenant of good faith so broad that it imposes a new, substantive term of enormous scope . . . . *especially* where there has been no breach of the parties' bargained-for contractual rights on which the implied covenant necessarily is based.

716 F.Supp. at 1519.

Implying the covenant requested by the Trustees would also be "troublesome" in view of the fact that the Indentures "could easily have been drafted to incorporate expressly the terms the

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[21] We might have reached a different conclusion if the Indentures did not specifically and unambiguously define the required content of the certificates or opinions. The Indentures define the required content, however, and that definition is not so ambiguous as to allow us to imply a reasonableness requirement akin to that implied by the Second Circuit in *Van Gemert*. *See Meckel v. Continental Resources Co.*, 758 F.2d 811, 816 (2d Cir.1985) (*Van Gemert* analysis does not apply when contractual provisions are unambiguous).

[Trustees] now urge this court to imply." *Hartford Fire*, 723 F.Supp. at 992. Section 603(f) of the Model Debenture Indenture Provisions even provides a basic model for such a provision:

> Except as otherwise provided in Section 601:
>
> . . . .
>
> (f) the Trustee shall not be bound to make any investigation into the facts or matters stated in any resolution, certificate, statement, instrument, opinion, report, notice, request, direction, consent, order, bond, debenture, coupon or other paper or document but the Trustee, in its discretion, may make such further inquiry or investigation into such facts or matters as it may see fit, and, if the Trustee shall determine to make such further inquiry or investigation, it shall be entitled to examine the books, records and premises of the Company, personally or by agent or attorney . . . .

See also AMERICAN BAR FOUNDATION, COMMENTARIES ON MODEL DEBENTURE INDENTURE PROVISIONS 61 (1971) ("Some provisions are added [to the indenture] with respect to the Trustee's right to investigate the accuracy of the facts stated in such a document. The Model Provisions confer such rights on the Trustee in Section 603(f)."). Moreover, the investors appear to be sophisticated institutional investors, and are thereby charged with some knowledge of the market and the provisions that could have been included in the Indentures. *Compare Metropolitan Life*, 716 F.Supp. at 1508, 1518 ("sophisticated investors"), *and Hartford Fire*, 723 F.Supp. at 992 (charging investors with knowledge of indenture provisions available to limit risk of takeover), *with Van Gemert*, 520 F.2d at 1383 ("less sophisticated investors"); *see also Indiana Nat'l Bank v. Mobil Oil Corp.*, 578 F.2d 180, 186 n.11 (7th Cir.1978) (crux of *Van Gemert* "was the protection of unsophisticated investors").

The third potential basis for relief—the Act—fares no better than its predecessors. Section 314(e) of the Act specifies the "evidence of compliance" (with a condition or covenant) that an issuer must furnish to an indenture trustee. 15 U.S.C.

§ 77nnn(e).[22] That section (like section 11.05 of the Indentures) requires certificates and opinions but does not require issuers to disclose the factual bases of certificates or opinions. Moreover, although section 314(a)(2) of the Act, 15 U.S.C. § 77nnn(a)(2), allows the SEC to promulgate rules or regulations that could require E-II to provide additional "evidence of compliance," the SEC to date has failed to promulgate any such rule or regulation. *See* 17 C.F.R. §§ 260.0-1 to 260.14a-1. Last, section 314(f), dispositively states:

> Nothing in this section shall be construed either as requiring the inclusion in the indenture to be qualified of provisions that the obligor upon the indenture securities shall furnish to the indenture trustee any other evidence of compliance with the conditions and covenants provided for in the indenture than the evidence specified in this section, or as preventing the inclusion of such provisions in such indentures, if the parties so agree.

Id. § 77nnn(f). This freedom-of-contract mentality leaves no room for the interpretation that the Trustees would thrust upon the Act.

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[22] This portion of the statue provides:

> Each certificate or opinion with respect to compliance with a condition or covenant provided for in the indenture shall include (1) a statement that the person making such certificate or opinion has read such covenant or condition; (2) a brief statement as to the nature and scope of the examination or investigation upon which the statements or opinions contained in such certificate or opinion are based; (3) a statement that, in the opinion of such person, he has made such examination or investigation as is necessary to enable him to express an informed opinion as to whether or not such covenant or condition has been complied with; and (4) a statement as to whether or not, in the opinion of such person, such condition or covenant has been complied with.

Id.

The doors to the federal courthouse remain open to the Trustees as they remain open to all litigants: subject to such prerequisites as subject matter jurisdiction and stating a cognizable claim. Until the Trustees are willing and able to meet those prerequisites, however, we must turn them away. The decision of the district court is

AFFIRMED.

APPENDIX 2

Opinion of the United States District Court in *Harris Trust and Savings Bank v. E-II Holdings, Inc.*, 722 F. Supp. 429 (N.D. Ill. 1990)

HARRIS TRUST AND SAVINGS BANK, an Illinois banking corporation, not individually but as Trustee; and LaSalle National Bank, a national banking association, not individually but as Trustee, Plaintiffs,

v.

E-II HOLDINGS, INC., a Delaware corporation, Defendant.

No. 89 C 203.

United States District Court,
N.D. Illinois, E.D.

Sept. 5, 1989.

LEINENWEBER, District Judge.

Plaintiffs, Harris Trust and Savings Bank as Trustee ("Harris") and LaSalle National Bank as Trustee ("LaSalle") (jointly referred to as the "Trustees"), are Trustees under certain Indenture Agreements dated July 1, 1987 covering two $750 million note issuances of defendant, E-II Holdings, Inc. ("E-II"). Trustees seek declaratory judgment under Fed.R.Civ.P. 57 and the Federal Declaratory Judgment Act ("FDJA"), 28 U.S.C. § 2201, seeking determination whether certain acquisitions and transactions were in compliance with the terms of the Note Indentures and the terms of the Trust Indenture Act of 1939, as well as a declaration as to the rights of the Trustees to obtain information from E-II. E-II has moved to dismiss on the grounds of lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted. Alternatively, E-II moves for transfer pursuant to 28 U.S.C. § 1404(a). For the reasons stated herein, the motion to dismiss is granted.

FACTS[1]

A. The Creation of E-II and the Issuance of the Debt Securities

In April 1986 BCI Holdings Corporation ("BCI") acquired Beatrice Companies, Inc. ("Beatrice") in a $6.2 billion leveraged acquisition (cmplt., ¶ 11). Subsequent to the acquisition of Beatrice, E-II was formed by BCI. In May 1987 E-II had an initial portfolio of fifteen businesses that were once part of Beatrice. These fifteen companies fell into two groups: the "Consumer Products" companies and the "Food Specialties" companies (cmplt., ¶ 12).

The nine "Consumer Products" companies were:

(a) Aristokraft, Inc. ("Aristokraft"), a manufacturer of kitchen and bath cabinets;

(b) Culligan International Company ("Culligan"), a producer of water softening equipment and water treatment systems;

(c) Day-Timers, Inc. ("Day-Timers"), a marketer of daily planners and time management aids;

(d) Home Fashions, Inc. ("Home Fashions"), a manufacturer of non-drapery window coverings;

(e) Samsonite Corporation ("Samsonite"), a manufacturer of luggage;

(f) Samsonite Furniture Co. ("Samsonite Furniture"), a manufacturer of leisure and casual furniture;

(g) the Stiffel Company ("Stiffel"), a manufacturer of high quality lamps;

(h) Twentieth Century Companies, Inc. ("Twentieth Century"), a manufacturer and distributor of plumbing supplies; and

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[1] The facts are taken from the complaint and "cmplt., ¶ —" refers to the specific numbered paragraph in the complaint.

(i) Waterloo Industries, Inc. ("Waterloo"), a manufacturer of tool storage products (cmplt., ¶ 13).

The six "Food Specialties" companies were:

(a) Aunt Nellie's Farm Kitchens, Inc. ("Aunt Nellie's"), which cans and glass pack produce;

(b) Beatreme Food Ingredients, Inc. ("Beatreme"), a producer of ingredients and food flavorings used by large food manufacturers;

(c) Frozen Specialties, Inc. ("Frozen Specialties"), a producer of frozen pizzas;

(d) Lowery's Meat Specialties, Inc. ("Lowrey's"), a producer of meat snacks;

(e) Martha White Food Specialists, Inc. ("Martha White"), a processor of corn meal and grits; and

(f) Pet Specialties, Inc. ("Pet"), a producer of pet foods (cmplt., ¶ 14).

For E-II's fiscal year ending February 28, 1987, its Consumer Products companies announced operating earnings of $111 million on sales of $1.1 billion. For the same period the Food Specialties companies announced operating earnings of $34.1 million on sales of $343.8 million (cmplt., ¶ 15). On July 1, 1987, pursuant to Indentures, E-II issued to the public $1.5 billion in public debt; $750 million in Notes and $750 million in Debentures. With respect to all relevant matters hereto, the Indentures are identical. In the prospectus for the sale of both Notes and Debentures, E-II represented that it would use a substantial portion of the proceeds of the public debt offering to pursue acquisitions for the holding company (cmplt., ¶ 16).

B. The Acquisition of E-II by American Brands

On or about December 4, 1987 E-II began acquiring a significant stock position in American Brands, Inc. ("American Brands"). As of December 4, 1987 this position was purportedly

4.3 percent of the common equity. American Brands was a holding company with subsidiaries engaged in various businesses, including the manufacture and sale of tobacco products, distilled spirits, office products and consumer products. On January 21, 1988 E-II filed with the Securities and Exchange Commission ("SEC") Schedule 13D, delineating its position in American Brands stock and its intention thereto (cmplt., ¶ 17). However employing what is sometimes referred to as the "pac man" defense, American Brands, through its wholly-owned subsidiary AMBR Holdings, Inc. ("AMBR"), commenced on January 22, 1988 a takeover of E-II whereby AMBR offered to purchase all of E-II's common stock for $13.00 per share. Thus American Brands defended against any forthcoming E-II hostile takeover attempt by launching a takeover bid against the potential acquirer (cmplt., ¶ 18).

On January 25, 1988 AMBR also made an offer to purchase the Notes at 103 percent of their principal amount plus accrued interest ("Offer to Purchase"). The Offer to Purchase was premised on 51 percent of the Holders of the Notes and Debentures ("Holders") accepting the Offer to Purchase and included exit consents whereby tendering Holders waived their rights to the protective covenants of the Indentures (the Note Indenture and Debenture Indenture are referred to jointly herein as "Indentures"). The Offer to Purchase informed the Holders that American Brands intended to establish a core group of companies in E-II after merging it into a subsidiary of American Brands. The Offer to Purchase stated that other than this restructuring and merger, no transactions involving E-II were contemplated by American Brands (cmplt., ¶ 19).

Specifically, the Offer to Purchase contained the following statement:

> "Parent [American Brands] believes that an acquisition of the Company [E-II] by Parent on the terms contemplated thereby represents an attractive business opportunity for Parent consistent with Parent's ongoing restructuring. In this regard, Parent intends to establish a core business consisting of Parent's Master Lock and Dexter Lock subsidiaries and the Company's Home

Fashions, Waterloo, Aristokraft and Twentieth Century subsidiaries and to place the Company's Day-Timers subsidiary in Parent's office products group, which has been identified as one of Parent's emerging core businesses. The Samsonite and Culligan businesses of the Company, although not clearly complementary to Parent's core business strategy, are well regarded as leaders in their respective markets. Parent presently intends to give serious consideration to retaining such businesses although it has made no final determination in this regard. Parent intends to dispose of the specialty food segment and other businesses of the Company. The timing of any such dispositions would, of course, depend, among other things, upon market conditions and price levels that could be achieved" (cmplt., ¶ 20).

As set forth above, the Offer to Purchase also stated that E-II would be merged with either AMBR or another subsidiary of American Brands:

"Following consummation of the Equity Offer, Parent [American Brands] intends to seek to influence the management of the Company [E-II], to seek at least majority representation on the Company's Board of Directors and to seek to affect a business combination between the Company and the Purchaser or another affiliate of Parent. Parent and the Purchaser presently intend that the business combination will take the form of a merger of the Company with the Purchaser [AMBR] or another subsidiary of Parent (cmplt., ¶ 21).

Attached to the Offer to Purchase as exhibit A was a copy of the Offer to Purchase E-II's common stock which set forth at page 26 a statement confirming American Brand's plans for E-II:

"Except as indicated in this Offer to Purchase, neither [American Brands] nor the Purchaser [AMBR] has any present plans or proposals which relate to or would result in an extraordinary corporate transaction of operations, or sale or transfer of assets, involving the

> Company [E-II] or any of its subsidiaries, or any material changes in the Company's corporate structure or business or the composition of its Board of Directors, management or personnel" (cmplt., ¶ 22).

Harris and LaSalle have been informed by certain Holders that the import of the above quoted provisions to members of the investment community was that: (a) E-II, the company obligated to pay the Notes and Debentures, together with certain of its subsidiaries, would be merged into another subsidiary of American Brands; and (b) certain businesses of E-II not considered integral to American Brands' business would be sold outside the E-II group. No other charges were contemplated. The end result would have E-II, the company obligated to pay the debt securities, remain merged with an American Brands subsidiary, a result viewed positively in the marketplace (cmplt., ¶ 23). Harris and LaSalle also have been informed by certain Holders that in reliance upon the statements of American Brands and AMBR regarding their stated intention for E-II, the Holders of the Notes and Debentures chose not to tender their Notes and Debentures (cmplt., ¶ 24).

As referred to above, the Offer to Purchase also contained a solicitation of exit consents from the Holders of the Notes and Debentures asking them to waive the protections of Sections 4.02 (restricting the payment of dividends and other corporate actions), 4.06 (maintenance of properties), and 5.01 (when company may merge, etc.) of the Indentures (cmplt., ¶ 25 and exs. 1 and 2 thereto). On February 1, 1988 American Brands and E-II announced that E-II had agreed to be acquired by AMBR at an increased price per common share of $17.05. Following the announcement the market price of the Notes and Debentures increased above the price offered by AMBR in the Offer to Purchase. On February 29, 1988, AMBR was merged into E-II, and E-II became a wholly-owned direct subsidiary of American Brands (cmplt., ¶ 26).

While the Offer to Purchase was outstanding the Notes traded as high as at 109 percent of their par value and the Debentures traded as high as at 108 percent of their par value. Thus the market value of these securities exceeded the offer made

by AMBR, and the Offer to Purchase was unsuccessful (cmplt., ¶ 27).

The Offer to Purchase the Notes and Debentures expired on February 22, 1988 (cmplt., ¶ 28). One Holder has indicated to the Trustees that there may be a question of whether or not a default existed at the time of American Brands' acquisition of E-II. According to at least one Holder the Officer's Certificates provided to the Trustees at that time did not reveal strict compliance with Section 5.01 of the Indenture in that the Consolidated Interest Expense Ratio required four fiscal quarters of E-II, which could not be provided since E-II was established in 1987 (cmplt., ¶ 29).

C. Post-Acquisition Extraordinary Transactions

After acquisition of E-II by American Brands there began a series of transactions which have been characterized by some Holders as a stripping of E-II of subsidiaries which were desirable for less than their fair market value and the sale of a stripped-down E-II to a highly leveraged company (cmplt., ¶ 30). These post-acquisition transactions, which are described below, are referred to herein as the "Extraordinary Transactions."

On March 31st and April 15, 1988 respectively, E-II sold Day-Timers and Vogel Peterson Company ("Vogel Peterson") to subsidiaries of American Brands for $278 million cash. Despite repeated requests of E-II, the Trustees have been unable to obtain information sufficient to permit the conclusion that such sales were in compliance with the provisions of the Indentures and applicable law (cmplt., ¶ 31). After these transactions the Trustees were given the annual Officers' Certificates which happened to be due at that time and which appear to indicate general compliance with the Indentures without setting forth the factual basis for such assertion of compliance. On June 13, 1988 American Brands announced that it was selling E-II to the Riklis Family Corporation ("RFC") which was highly leveraged. RFC owns substantially all of the common stock of McGregor Holding

Corporation ("McGregor") which in turn owned all of the outstanding shares of common stock of Faberge, Incorporated ("Faberge"). Following the announcement of the sale to RFC, the price of the Notes and Debentures dropped precipitously. This was reportedly indicative of the feeling in the financial markets that the Notes and Debentures would be incurring much more risk with RFC in control of the corporation because of its poorer credit rating, and because RFC, whose publicly traded debt instruments yielded as high as 18 percent in June of 1988, was substantially laden with debt (cmplt., ¶ 32). On June 27, 1988 E-II sold the following subsidiaries to American Brands for $415 million cash: Aristokraft, Waterloo, Twentieth Century, Stiffel and Aunt Nellie's. Despite repeated requests of E-II, the Trustees have been unable to obtain information sufficient to permit the conclusion that such sales were in compliance with the provisions of the Indentures and applicable law (cmplt., ¶ 33).

On July 1, 1988 McGregor Acquisition Corporation ("McGregor Acquisition"), a wholly-owned subsidiary of McGregor, purchased all one thousand outstanding shares of common stock of E-II for $950 million cash and $250 million in face amount of redeemable preferred stock of McGregor Acquisition. Immediately following the purchase McGregor Acquisition "contributed" to E-II all of the issued and outstanding shares of common stock of Faberge, whose book value was approximately $93 million, but which the Board of Directors of E-II valued at $925 million, based in part on a valuation study by investment bankers, in exchange for eight hundred forty shares of E-II common stock. Immediately following E-II's Board of Directors purportedly declared a cash dividend of $925 million, which was paid to McGregor Acquisition by E-II and subsequently used toward the payment of financial obligations incurred in connection with the acquisition of E-II's common stock by McGregor Acquisition. Despite repeated requests of E-II, the Trustees have been unable to obtain information to permit the conclusion that this transaction was in compliance with the provisions of the Indentures and applicable law (cmplt., ¶ 34).

After the sale of E-II to McGregor Acquisition, upon receipt of E-II's quarterly report dated July 27, 1988, and from other

sources, the Trustees believed that E-II had entered into other unusual transactions for which the Trustees have not received an explanation or justification from E-II. E-II purchased from RFC for $97 thousand the rights to receive a series of contingent payments aggregating $125 million from Guiness PLC in five annual installments to October, 1992. RFC agreed to pay any sum not received by E-II upon the maturity of this note (cmplt., ¶ 35).

E-II additionally loaned $6 million in August, 1988 to Rapid-American Company, a wholly-owned subsidiary of RFC, evidenced by a demand promissory note with interest at prime rate (cmplt., ¶ 36). On August 31, 1988 E-II sold Beatreme to "an unrelated third party" for approximately $130 million cash. E-II also entered into a letter of intent to sell Lowrey's to "an unrelated third party" for $33.5 million (cmplt., ¶ 37). As of October 27, 1988 Faberge had been utilizing funds advanced by E-II to redeem its subordinated debt in an amount of $345 million, more scheduled to have been redeemed in November, 1988 (cmplt., ¶ 38 and Mason affdvt. ex. B). On December 23, 1988 E-II announced in the *Wall Street Journal* the sale of Home Fashions to PFC Acquisitions, Inc. (cmplt., ¶ 39).

On February 13, 1989 it was reported in the *Wall Street Journal* that E-II had reached an agreement with Unilever Group ("Unilever") to sell "the bulk of Faberge, Inc." for $1.55 billion (Mason affdvt., ¶ 15 and ex. D thereto). The terms of the sale have to this date not been announced. It is unclear at this point to what extent Unilever will assume the debt of Faberge. Thus it is impossible for the Trustees to evaluate the merits of the sale and the $925 million "dividend payment" until such time as the terms of the deal are disclosed and the paydown of the Faberge debt is considered.

As recently as March 15, 1989 E-II announced the sale of yet another subsidiary, Samsonite Furniture (Mason affdvt., ¶ 15 and ex. C thereto). The terms of that transaction and its potential impact on the Holders are likewise unknown to the Trustees.

D. Provisions of the Indentures (cmplt., exs. 1 and 2)

The relevant articles of the Indentures include Article IV, which contains a covenant, *inter alia,* that limits stock payments, provides for notices of default and the furnishing of compliance reports; Article V which provides for changes in corporate structure; Article VI which establishes events of default and remedies; and Article VII, which provides for the rights and obligations of the Trustees.

Specifically for our purposes, Section 4.02 provides a limitation on stock payments based upon certain formulae set forth in the Section. These formulae provide maximums based upon percentages of cumulative net income with the values of non-cash items "to be determined in good faith by the Board of Directors and evidenced by a resolution of the Board of Directors." Section 4.07 requires E-II to deliver to the Trustee within one hundred days after the end of each fiscal year an Officers' Certificate stating whether or not the signers know of any default or event of default as provided for in the Indenture.

Section 5.01 provides limits on the ability of E-II to consolidate with, merge with or into, or transfer all or substantially all of its assets without complying with detailed provisions provided in this Section. Subparagraph (5) of this Section requires the company to deliver to the Trustee "an Officers' Certificate attaching arithmatic computations to demonstrate compliance with a certain consolidated interest expense ratio provided in subparagraph (4) and an opinion of counsel, each stating that such consolidation, mergers or transfers in such supplemental Indenture comply with this Section 5.01 and that all conditions precedent herein provided for relating to such transactions have been complied with."

Section 6.01 defines and describes "Events of Default." Seven different "events" are provided for, including non-payment of interest Clause (1), non-payment of principal Clause (2), incurring excessive indebtedness Clause (4), becoming subject to a final judgment in excess of $50,000,000 Clause (5), becoming involved in a voluntary or involuntary bankruptcy proceeding Clauses (6)

and (7), and a catch-all in Clause (3) if "the company fails to comply in any respect with any of its other agreements contained in the securities or this Indenture and the default continues for the period and after the Note specified below." Section 6.01 further provides that a default under Clause (3) "is not an event of default until the Trustee notifies the company in writing, or the Holders of at least a majority of the principal amount of the securities outstanding notify the company and the Trustee in writing, of the default and the company does not cure the default within thirty days after receipt of the notice." Section 6.03 provides that if an event of default occurs and is continuing the Trustee may pursue any available remedy by proceeding at law or in equity. Section 6.04 permits waiver of an existing default or an event of default, except a default on the payment of principal, premium, if any, or interest if the Holders of at least a majority of the principal amount of the outstanding securities by notice to the Trustee do so. Section 6.05 allows the Holders of at least a majority in the principal amount of the outstanding securities to direct the time, method and place of conducting any proceeding for any remedy available to the Trustee. However this paragraph permits the Trustee to refuse to follow direction if it determines that to do so would unduly prejudice the rights of other security Holders. Section 6.06 limits the security Holder's right to file suit.

Section 7.01 establishes the duties of the Trustee. Subparagraph (a) requires the Trustee, if an event of default occurs and is continuing, to exercise its rights and powers vested in it by the Indenture under the prudent person rule. Clause (2) of subparagraph (b) provides that, except during the continuance of an event of default, the Trustee, in the absence of bad faith, "may conclusively rely as to the truth of the statements and correctness of the opinions expressed therein upon certificates or opinions, which by any provision of this Indenture are required to be furnished to the Trustee and conform to the requirements of this Indenture. The Trustee however shall examine the certificates and opinions to determine whether or not they conform to the requirements of this Indenture." Section 7.02, subparagraph (b) gives the Trustee the right to "require an Officers' Certificate or an opinion of counsel before acting or refraining from acting"

and "shall not be liable for any action it takes or admits to take in good faith and reliance on such certificate or opinion provided the same conform to Section 11.05." Section 7.05 requires the Trustee if a default or an event of default occurs and is continuing, to notify by mail each security Holder notice of the default or event of default within ninety days after it occurred unless it has been cured. However in the event of a default other than in the payment of principal, premium or interest, the Trustee "may withhold the notice if and so long as a committee of its Trust officers in good faith determines that withholding the notice is in the interest of the security holders." Finally, Section 11.05 provides for the contents of certificates or opinions. It provides that each certificate or opinion shall include:

> "1) a statement that the person making such certificate or opinion has read such a covenant or condition;
>
> 2) a brief statement as to the nature and scope of the examination or investigation upon which the statements or opinions contained in such certificate or opinion are based;
>
> 3) a statement that, in the opinion of such person, he has made such examination or investigation as is necessary to enable him to express an informed opinion as to whether or not such covenant or condition has been complied with; and
>
> 4) a statement as to whether or not in the opinion of such person, such condition or covenant has been complied with, and such other opinion as the Trustee may reasonably request; provided however, that with respect to matters of fact and opinion of counsel may rely on an Officers' Certificate or certificates of public officials."

E. Communication Between E-II and the Trustees

The Trustees, despite repeated requests, have been unable to obtain information and facts from E-II which they claim is

needed to permit them to conclude that the Extraordinary Transactions are consistent with the terms of the Indentures and applicable law. The position of E-II is that all that the Trustees are entitled to receive under the terms of the Indentures are the certificates and opinions which were in fact provided prior to the occurrence of most of the Extraordinary Transactions. E-II contends that those certificates and opinions are the only ones specifically provided for by the Indentures, that the Trustees must conclusively rely on such certificates and opinions, and that the Trustees may not attempt to look past such outdated certificates and opinions (cmplt., ¶ 42). Harris and LaSalle have made numerous attempts to obtain additional information regarding the Extraordinary Transactions. By a letter dated February 29, 1988 E-II sent to Harris and LaSalle the opinion of its general counsel, Karl M. Becker, that the merger of AMBR into E-II complied with the covenants and conditions of Sections 5.01 of the Indentures and all conditions precedent in the Indentures to such merger (cmplt., ¶ 43).

By Officers' Certificate dated June 7, 1988, E-II certified to Harris and LaSalle that it did not know of any default or event of default by E-II under the respective Indentures. These certificates are the annual Officers' Certificates required by the Indentures and were given prior to the announcement of the sale of E-II to McGregor Acquisition and thus would only cover the sales of Day-Timers and Vogel Peterson. No other Officers' Certificates have been received by the Trustees covering any of the other Extraordinary Transactions referred to above (cmplt., ¶ 44).

After public announcement of the proposed sale of E-II to McGregor Acquisition, and the related transactions between E-II and American Brands involving the sale by E-II to American Brands of a substantial number of E-II's operating subsidiaries, Harris and LaSalle, by letters dated June 15, 1988, requested an opinion of counsel of E-II that such transactions did not violate any provisions of the Indentures under which the debt securities were issued, including, but not limited to, Sections 4.06 and 5.01 of the Indentures. Further, the Trustees sought additional information regarding the proposed transactions and particularly the application of the cash proceeds to be received in connection with

the transactions. Also, the Trustees requested a pro forma balance sheet and income statement of E-II after giving effect to the transactions (emplt., ¶ 45). By letters dated June 22, 1988 Harris and LaSalle requested additional information regarding the adequacy of consideration paid by American Brands for the operating subsidiaries in the McGregor Acquisition transaction and also the previous transactions involving Day-Timers and Vogel Peterson. The Trustees also stated that for purposes of Sections 4.02 of the Indentures they needed to be satisfied that the consideration paid for all the above transactions was to be at least equal to the book value of the assets transferred or to be transferred to American Brands (emplt., ¶ 46).

The Trustees each received the opinion of Chadbourne & Parke, counsel for E-II, dated June 22, 1988 stating that Sections 5.01 of the Indentures are not applicable to the sale by American Brands of the E-II stock to McGregor Acquisitions nor the sale of the subsidiaries to American Brands. For purposes of writing this opinion, counsel had been advised by E-II that the value of the assets of the divested subsidiaries was only approximately 25 percent of E-II's assets. It was also the opinion of that counsel that the sale of the divested subsidiaries at no less than their book value would be in compliance with Sections 4.02 of the Indentures. It was further the opinion of that counsel that Sections 4.06 of the Indentures, which are directed to maintenance of properties, were not applicable to the transactions related to the divested subsidiaries. Moreover, that counsel opined that even if Sections 4.06 of the Indentures were held to apply, their provisions would be met. No independent financial analysis of the transactions was performed and counsel was relying on information supplied to it by E-II. No reference or specific knowledge was disclosed in the opinions as to the Extraordinary Transactions outlined above and the effect such would have on that opinion (emplt., ¶ 47).

The Trustees each received letters from D.L. Bauerlein, Jr., ("Bauerlein"), Vice President and Treasurer of E-II, dated as of

June 22, 1988. In those letters he stated that E-II was not furnishing the financial information requested by the Trustees. According to him the furnishing of such information is not required by the Indentures (cmplt., ¶ 48).

Pursuant to a letter dated June 30, 1988 LaSalle informed E-II that the Indentures entitled LaSalle to obtain such information in order to enable LaSalle to properly discharge its duties under the Debenture Indenture. LaSalle informed E-II that without sufficient disclosure of the documentation, structure and economic effect of the transactions it might be impossible for the Holders of the Debentures and LaSalle to determine the accuracy of E-II's statements concerning compliance with the Indentures (cmplt., ¶ 49).

E-II, by letters of Bauerlein dated July 1, 1988, stated that the sales of Waterloo, Twentieth Century, Stiffel and Aunt Nellie's would be made a price at least equal to the book value thereof, and that the sales of Day-Timers and Vogel Peterson were also in excess of the book value thereof. E-II disclosed the opinion of Morgan Stanley and Company ("Morgan Stanley") dated June 14, 1988 with respect to those sales. However Morgan Stanley noted that in rendering its opinion it had not made any independent verification of the information supplied to it by E-II (cmplt., ¶ 50).

Pursuant to letters dated July 18, 1988 Harris and LaSalle wrote to Paul Weiner, current Treasurer of E-II, indicating their awareness from press reports that immediately upon the acquisition of E-II by RFC (McGregor Acquisition) that Faberge was contributed to E-II at a value determined to be $925 million and that concurrently with such contribution a dividend of $925 million was declared and paid by E-II to RFC (McGregor Acquisition). The Trustees reminded E-II that under Sections 4.02 of the Indentures there is a restriction on the amount of dividends that may be declared and paid by E-II. This restriction will not permit so called "stock payments" (which would include other distributions on and purchases or redemptions of capital stock as well as dividends) made after February 28, 1987 to exceed a specified percentage of Cumulative Net Income plus the aggregate net proceeds received from the issuance of additional stock by E-II.

The Trustees stated that in order to ascertain whether the dividend paid to RFC (McGregor Acquisition) was in compliance with the Indentures, Trustees required that E-II provide them with a satisfactory showing establishing that this restriction was not violated. The Trustees stated that they needed to have E-II confirm to them the basis upon which the value of $925 million was given to Faberge and also compliance with the other conditions for payment of this dividend under Sections 4.02. Further, the Trustees noted that the transfer of Faberge to E-II was characterized as a contribution of capital. The Trustees noted that the dividend restriction permits dividends based in part upon the issuance of additional capital stock. Normally a contribution of capital would not involve issuance of any additional stock. Trustees requested information regarding whether any additional stock was issued in connection with this transfer and the particulars of such issuance. The Trustees repeated their request for a pro forma balance sheet and an income statement of E-II giving effect to the American Brands transactions with E-II. The Trustees stated that they needed the information in order to make a determination that these transactions did not result in a sale or transfer of substantially all the assets of E-II. Trustees noted that in the opinion delivered to them, referred to above, counsel to E-II stated that the assets in question amounted to 25 percent or less of the total assets of E-II, but counsel stated that such conclusion was based upon information furnished to counsel. The Trustees indicated that they had not had the benefit of such information (cmplt., ¶ 51).

On July 21, 1988 LaSalle wrote to E-II requesting, *inter alia*, an Officers' Certificate detailing supporting facts, an Accountant's Certificate, and an Opinion of Counsel with respect to various specified aspects of the Extraordinary Transactions which had occurred or were contemplated as of that date. LaSalle requested that the certificates be in compliance with Section 11.05 of the Debenture Indenture, and that such specifically set forth any and all assumptions or any and all documents or facts which were assumed or relied upon. E-II has not complied with this request of LaSalle (cmplt., ¶ 52).

On August 10, 1988 a meeting was held at Chicago, Illinois, attended by E-II, its counsel and the Trustees. E-II denied that Trustees had any duty to make any investigation as to whether E-II was in compliance with the terms of the Indentures other than by way of receiving and examining from time to time the statements and certificates which were specifically provided for under the Indentures. E-II also denied that under the terms of the Indentures Trustees had the right to information requested in their previous letters. At the meeting on August 10, 1988 E-II indicated to the Trustees that E-II's Board of Directors had made the determination of the value of Faberge common stock at $925 million, based in part upon a valuation study by investment bankers. E-II also advised Trustees that both the investment bankers and the board of directors had considered the earnings projections of Faberge previously prepared by its chief executive officer and the fact that Faberge was operating ahead of its projections. E-II did not however provide Trustees with a copy of the valuation study of Faberge (cmplt., ¶ 53).

Trustees have continued to make requests for the valuation study and other previously mentioned information but such has not been forthcoming. E-II has indicated that it might consider providing the valuation study if the Trustees would agree to keep such confidential from the Holders of the Notes and Debentures. Trustees however do not feel they are in a position to agree because of what they perceive to be their fiduciary duty to the Holders to such a request. On November 16, 1988 counsel for E-II again met with the Trustees in Chicago with respect to this matter. However E-II again declined to produce the requested information, opinions and certificates in the form specified (cmplt. ¶ 54). Trustees do not contend that they have been denied any of the certificates or opinions specifically required by the Indentures. They do apparently contend that, at least by implication, Section 11.05 of the Indentures requires E-II to set forth specific information which will allow the Trustees to determine whether the certificates or opinions furnished comply with the other requirements of the Indentures.

F. Notices of Default

Harris, as of January 3, 1989, received notices of default which purported to be delivered by the Holders of a majority of the amount of the Notes. Such notices state in relevant part:

> "Reference is also made to the condensed financial statements contained in the Quarterly Report for the quarter ended May 31, 1988, of E-II. In note 8 to those Financial Statements, E-II makes the following statement:
>
> > 'On July 1, 1988 all the outstanding common stock of E-II was sold to McGregor. On July 2, 1988 in exchange for 840 shares of E-II common stock, E-II received a capital contribution from McGregor of all of the issued and outstanding common stock of Faberge, Incorporated ("Faberge") which recently acquired Elizabeth Arden. The new board of directors of E-II valued the stock of Faberge, after careful consideration and advice of outside independent appraisers, at $925 million. Immediately following the contribution, a dividend of $925 million was declared and paid by E-II to McGregor, the proceeds of which were applied toward repayment of the financing obligation incurred in connection with the acquisition of E-II.'
>
> The payment by E-II to McGregor of the 'dividend' of $925 million described in the quote above constitutes a violation of Section 4.02 of the Indenture. Accordingly, as a consequence of E-II's failure to comply with Section 4.02 of the Indenture a default has occurred and is continuing as specified by Section 6.01(3) of the Indenture.
>
> Therefore, pursuant to Section 6.01 of the Indenture, the undersigned hereby demands that the foregoing default by remedied" (emplt., ¶ 55).

By letters dated December 28, 1988 Holders of the Notes who had given notice of default were informed by E-II, with copy to Harris, that their assertion that a violation of Sections 4.02 of the Indentures has occurred is false and wholly unsupported by fact. Further, E-II contended that each notice of default was defective and improper in that such failed to specify the alleged default in any meaningful way, and E-II has demanded that such be withdrawn (cmplt., ex. 23).[2]

G. Trustees' Lawsuit

On January 10, 1989 Trustees, in order to obtain a judicial determination of the dispute which exists between E-II and the Holders as to the proper interpretation of the Indentures and applicable law, filed the instant suit.

Trustees request herein that the court determine, *inter alia:*

"(1) whether the acquisition of E-II by American Brands was in compliance with the terms of the Indentures and principles of applicable law and equity, including the implied covenants of good faith and fair dealing;

(2) whether the post-acquisition Extraordinary Transactions were in compliance with the terms of the Indentures and principles of applicable law and equity, including the implied covenants of good faith and fair dealing;

(3) whether E-II has complied with the provisions of the Trust Indenture Act, including but not limited to Section 314, which requires evidence of compliance with indenture provision;

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[2] This notice was subsequently withdrawn when it was discovered that an error in computation had been made so that a majority of the amount of the Notes had not in fact joined in giving E-II notice (*see* Grim affdvt., ex. C).

(4) whether an Event of Default has occurred on the Notes or the Debentures within the meaning of Section 315 of the Trust Indenture Act;

(5) whether or not the assets remaining in E-II are sufficient to generate sufficient revenues to ensure payment of principal, interest and sinking fund obligations of the Notes and Debentures;

(6) what actions the Trustees should take with respect to the Notices of Default Harris has received in the light of the letter from E-II declaring such ineffective;

(7) declaring whether any future asset sales by E-II can be permitted and, if so, under what circumstances;

(8) declaring to what information the Trustees are entitled in order to determine if unusual occurrences such as the Extraordinary Transactions violate the terms of the Indentures" (emplt., ¶ 90).

E-II claims that it is necessary for the Trustees to take a position regarding the existence of a default as a prerequisite to establish the existence of a case or controversy. E-II further claims that Trustees' failure to do so prevents the court from having jurisdiction.

H. Further Development Regarding Notices of Default

On Thursday, January 19, 1989 Harris, through its counsel, was informed by counsel for the Holders of the Notes who had delivered the notices of default that because of an error in computation as to its holdings by one of the Holders who had given notice, Harris was in possession of notices of default by slightly less than a majority of the principal amount of the Notes. A letter to this effect followed on January 20, 1989 (Grimm affdvt., ex. C). Since that time "ustees have received further notices of default (Mason affdvt., ¶ 14) although they admit that a majority of Holders is still lacking.

I. Current Procedural Status

E-II has moved to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. Alternatively, E-II has moved for transfer under 28 U.S.C. § 1404(a).

DISCUSSION

The gravamen of E-II's motion is that Trustees' complaint does not state a case or actual controversy within the meaning of Article III of the Constitution and, accordingly, there is no jurisdiction to hear this case. In essence, Trustees, according to E-II, are merely asking the court for advice on how to interpret their rights under the Note Indentures. This according to E-II amounts to a request for an advisory opinion which a district court has no jurisdiction to issue.

The FDJA provides that federal courts may issue declaratory judgments only in cases of "actual controversy" thus making it constitutional under Section 2 of Article III of the Constitution. A "controversy" must be one that is appropriate for judicial determination and is definite and concrete and touching upon the legal relations of the parties having adverse legal interests, as opposed to a dispute of a hypothetical or abstract character. *Connecticut v. Haworth,* 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617 (1937). As is often the case, these generalities are less than a sure guide to decision and the difference between an abstract question and a controversy is one of degree and there is no precise test for determining the presence of a controversy. "Basically the question in each case is whether the facts alleged, under all of the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co. v. Pacific Coal & Oil Co.,* 312 U.S. 270, 273, 61 S.Ct. 510, 512, 85 L.Ed. 826 (1941). With these principles in mind it is necessary to analyze the facts of this case and what Trustees are actually requesting.

The basic complaint of the Trustees is that after E-II was acquired by American Brands it began a series of transactions, described earlier in this opinion, which have been characterized by some but not a majority of the Holders of the securities as a stripping of subsidiaries for less than their fair market value, which was followed by a sale of a "stripped-down" E-II to a highly leveraged company, RFC, which caused the price of the securities to drop precipitously in the market. Subsequent to this a further transaction involving subsidiaries of RFC was carried out which in effect caused E-II to purchase the outstanding shares of Faberge, a company owned by a subsidiary of RFC, at a value greatly in excess of Faberge's book value. However E-II has furnished Trustees with all of the certificates and opinions specifically required of it by the Indentures, each attesting to the fact that these transactions were carried out in accordance with the Indentures. There is no contention that any of these certificates and opinions failed to comply with the formal requirements of Section 11.05 of the Indentures. Trustees however complain that E-II has resolutely refused to provide them with any detailed financial information to permit verification of the matters contained in the certificates which they contend violate certain implied requirements of the Indentures. As a result Trustees contend that they are powerless to verify whether any of the transactions and acquisitions constituted an "Event of Default" as the same is defined in the Indentures. They contend that although paragraph 7.02(b) permits them to rely on these certificates, the Indentures do not say that they must rely on them nor do the Indentures prohibit further investigation by the Trustees in order to verify the accuracy of the certificates. They further contend that Section 7.02(b) requires that they determine that the certificates conform with the requirements of Section 11.05 and that this requires access to financial details. Essentially they argue that E-II ought not to be permitted to conceal a violation of the Indentures if it has in fact committed a violation.

On the other hand, E-II argues that the Indentures do not give Trustees the power to require E-II to turn over information not specifically provided for and therefore it has no duty to do so. Instead, Trustees are to rely on the statements and certificates for which the Indentures specifically provide. E-II further argues

that under New York law (which both parties agree apply) where there is an instrument that contains a specific covenant regarding a subject there are no covenants to be implied concerning that subject. *Broad v. Rockwell Intern. Corp.*, 642 F.2d 929, 957 (5th Cir.1981). Since the Indentures contain specific covenants covering what E-II must disclose to the Trustees, no additional covenants to provide information not specifically provided for can be implied.

E-II also argues that there is no actual controversy between the parties because the Trustees have been unwilling or unable to declare a default. Therefore the real purpose of their lawsuit is to get an advisory opinion from this court whether they have the power to do so. In support E-II cites *People v. Archer-Daniels-Midland*, 704 F.2d 935 (7th Cir.1983).

In *Archer-Daniels-Midland* the State's Attorney of Peoria County filed a suit that was eventually removed to federal court. This suit sought a declaration whether an Illinois statute prohibiting the employment of professional strikebreakers was preempted by the National Labor Relations Act. The appeals court concluded that there was no subject matter jurisdiction to make such a declaration because the disagreement with regard to the validity and scope of the Illinois Strikebreaker's Act had not ripened into an actual controversy between the state and the defendant. In so finding the court pointed out that the State's Attorney had not yet decided whether to bring criminal charges against Archer-Daniels-Midland nor did the complaint allege that he intended to do so in the event of a declaration or no preemption and, apparently, "before making up his mind he wanted to know whether he might become a cropper on preemption." Rather than to ask experts on labor law for advice on this issue, he decided to seek advice from what he thought was a more authoritative quarter, the courts.

> "Evidently he will not make a final decision whether to prosecute Archer-Daniels-Midland until he gets authoritative judicial advice. There is thus no actual controversy between him and the company but only a potential controversy that will become actual if and when he prosecutes. Regardless of the advice the court

gave, there is nothing compelling the State's Attorney to act on it."

Comparing the facts here as alleged by Trustees in their complaint and the facts in *Archer-Daniels-Midland* appears to foreclose the relief sought by the Trustees with respect to whether E-II violated the Indentures creating an "Event of Default." For a variety of reasons, including lack of information and lack of sufficient Holder participation, Trustees have declined to declare an event of default under the terms of the Indentures. Even if this court should conduct the lengthy evidentiary hearings necessary for it to make an independent determination that an event of default had in fact occurred with regard to one or more of the transactions, so as to empower the Trustees to act, the Indentures do not require them to act. Under Section 7.05, in the event of a default other than payment of principal, Trustees may withhold the notice if the Trustees determine withholding is in the interest of the security Holders. Even if the Trustees did act, under Sections 6.04 of the Indentures, the security Holders holding a majority of the principal amount of indebtedness have the power to overrule the Trustees. Therefore any opinion that the court might issue could be nothing more than an advisory opinion, advising Trustees of their rights but not resolving any actual case or controversy. *Archer-Daniels-Midland* at p. 941. The Trustees, in effect, at all times have the power to create a controversy but they have not yet done so nor do they have to do so.

Trustees do not even try to distinguish *Archer-Daniels-Midland*. They instead argue their right to standing in behalf of the security Holders citing cases such as *GMC v. Calif. Bd. of Equalization*, 815 F.2d 1305, 1307-08 (9th Cir.1987), which gave standing to fiduciaries of employee benefit plans. *See* also *Central Montana Electric Power Corp. v. Administrator*, 840 F.2d 1472, 1474-75 (9th Cir.1988) (giving standing to cooperatives), and *Adams v. Morton*, 581 F.2d 1314, 1319 (9th Cir.1978), *cert. denied*, 440 U.S. 958, 99 S.Ct. 1498, 59 L.Ed.2d 771 (1979) (giving standing to representatives of Indian tribes). In each of these cases however the group represented had suffered a "distinct and palpable" injury and the plaintiff was allowed to proceed in its representative capacity. On the other hand, in this case neither the Trustees nor the Note

Holders have as yet alleged any injury and instead are proceeding in the realm of conjecture and hypothesis. A party may proceed in a representative capacity only if it alleges facts sufficient to make out a case or controversy had those it represents themselves brought suit. *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 2214, 45 L.Ed.2d 343 (1975). Consequently none of these cases help the Trustees with the case or controversy issue.

Trustees also in support of their position point to a suit brought by E-II in New York as tacit recognition that a case and controversy exists between the parties. However that action was precipitated by a notice of default issued by an alleged majority of Note Holders and sought a declaration that a notice of default was invalid (Grim affdvt., ex. D). E-II denied that a default existed, that a default had been properly declared, and that a majority of Note Holders had joined in the notice of default. Thus an actual controversy existed. Once it was admitted that a majority of Note Holders had not joined, thus invalidating the default, E-II dismissed the New York suit (Grim affdvt., ex. F).

Finally, Trustees could precipitate an actual controversy by declaring a default or by convincing the Holders of a majority of the principal amount of notes to join them in doing so under Clause (3) of Section 6.01 for failure to abide by the terms of the Indentures. This they have been unwilling or unable to do.

Accordingly, based on *Archer-Daniels-Midland*, there is no subject matter jurisdiction to advise Trustees whether the various acquisitions and transactions were in compliance with the terms of the Note Indentures.

In accord with this is *Gardner & Florence Call Cowles Foundation v. Empire, Inc.*, 589 F.Supp. 669 (S.D.N.Y. 1984). Here debenture holders brought suit against the obligor claiming that the merger with another corporation violated contractual rights set out in the indenture under which the debentures were issued. *Inter alia*, plaintiffs sought a declaration that defendant was in default. The court noted that plaintiffs had neither declared a default themselves nor obtained the requisite participation of the security holders of 25 percent and therefore dismissed the claims as improperly brought, *id.* at p. 675.

Reading Trustees' brief indicates however that their real complaint is with the lack of information supplied to it by E-II concerning these acquisitions and transactions. They point out that the Extraordinary Transactions described in their complaint have drastically changed the character of E-II, including the nature of the risk. They charge that if E-II is permitted to conceal the details of these transactions they will be powerless to make an independent determination as to whether a default has occurred. They are faced with a Hobson's choice to declare a default in a vacuum and run the risk of triggering cross-default provisions in other E-II loan agreements, possibly precipitating the commencement of bankruptcy proceedings, or to fail to declare a default and perhaps endanger the repayment rights of the security Holders.

Arguably an actual dispute may exist over Trustees' rights to additional information.[3] Trustees claim that under the Indenture agreements they are entitled to detailed information to make an informed decision that the certificates of compliance it received from E-II are accurate, i.e., that the transactions certified do comply. E-II strenuously denies that Trustees are entitled to any information whatsoever. A declaration of the court could actually resolve this dispute. Consequently this claim has the elements of controversy that is lacking in Trustees' other claims. In fact E-II seems to recognize there is a judicial controversy here. E-II argues instead that Trustees' complaint, rather than failing for want of jurisdiction insofar as it seeks a declaration of their right to information, fails to state a claim upon which relief may be granted.

The gist of E-II's argument is that the right to the information demanded is not expressly provided for in the Indentures and therefore the rule against implied covenants in New York (*see Hazzard v. Chase Nat'l Bank of N.Y.C.*, 159 Misc. 57, 287 N.Y.S. 541, 567 (1936), *aff'd*, 257 App.Div. 950, 14 N.Y.S.2d 147 (1939), *aff'd*,

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[3] It also arguably does not. A failure to provide information could constitute an "Event of Default" under Clause (3) of Section 6.01. Accordingly, it could constitute a basis for a notice of default if done so in accord with the terms of Section 6.01. Trustees have not proceeded this way.

282 N.Y. 652, 26 N.E.2d 801 (1940), *cert. denied*, 311 U.S. 708, 61 S.Ct. 319, 85 L.Ed. 460 (1940)), controls. Although Trustees admit that there is no specific provision in the Indentures entitling them to the information they request, they insist that the Indentures must be construed to effectuate their purpose—to protect the security Holders. They argue that since nothing in the Indentures precludes the right of the Trustees to investigate further in the event they have doubts regarding the reliability of the certificates and opinions, they are entitled to receive this information. Trustees also refer to the Trust Indenture Act of 1939 ("TIA") and its philosophy of protecting security holders as providing a basis for an expansive view of the Trustees' rights to information.

However neither the Indentures nor the TIA appears to require the obligor to furnish information not specifically provided for in the Indentures themselves and Trustees, as we have seen, do not refer the court to any specific provision in the Indentures, nor do they refer us to any provisions of the TIA requiring the furnishing of such information.

The only provision in the TIA that appears to cover the subject of the obligor providing information to the trustee is Section 314 (15 U.S.C. § 77nnn). Subparagraph (a)(2) requires the obligor to file with the indenture trustee under rules and regulations prescribed by the SEC:

> "such additional information with respect to compliance by such obligor with the conditions and covenants provided for in the indenture, as may be required by such rules and regulations . . . "

However the court has been unable to find any such rules and regulations prescribed by the SEC pursuant to this section (*see* 17 C.F.R. 260.0-1 *et seq.*) and neither party has referred to any such rule or regulation. Further, subparagraph (f) of Section 77nnn provides:

> "Nothing in this section shall be construed either as requiring the inclusion in the indenture . . . of provisions that the obligor upon the indenture securities shall furnish to the indenture trustee any other evidence of compliance with the conditions and covenants

> provided for in the indenture than the evidence specified in this section, or as preventing the inclusion of such provisions in such indenture, if the parties so agree."

The philosophy appears to be that an obligor ought to be protected from having to disclose what could constitute sensitive information other than what the security laws and the rules and regulations issued pursuant to these laws require unless the obligor specifically agrees to do so.

Therefore absent any specific requirement in the Indentures, E-II is under no obligation under New York law, the TIA, or rules and regulations issued under authority of the TIA to furnish information on its acquisition or transactions other than the certificates and opinions expressly provided for.

Accordingly, to the extent that the court has jurisdiction to entertain Trustees' complaint, it appears that the complaint fails to state a claim upon which relief can be granted.

CONCLUSION

For the reasons herein stated, E-II's motion is granted and the complaint is dismissed.[1] Since this action disposes of the case it is unnecessary to rule on E-II's motion to transfer pursuant to 28 U.S.C. § 1404(a).

IT IS SO ORDERED.

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[1] The complaint contains two counts: Count I for declaratory judgment and Count II for indemnity for plaintiffs' costs and attorney's fees for bringing this action and for their costs in administering the trusts. Defendant has moved to dismiss on the ground that there is no indication that any controversy exists with regard to their entitlement to such claims. Plaintiffs have failed to respond to defendant's motion and it is therefore granted.

APPENDIX 3

United States Court of Appeals' Order denying the petition for rehearing with suggestion for rehearing in banc dated May 3, 1991

United States Court of Appeals

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604
MAY 3, 1991.

BEFORE
HON. HARLINGTON WOOD, JR., Circuit Judge
HON. JOHN L. COFFEY, Circuit Judge
HON. MICHAEL S. KANNE, Circuit Judge

NO. 90-1095	
HARRIS TRUST AND SAVINGS BANK, an Illinois banking corporation, not individually but as Trustee, and LA SALLE NATIONAL BANK, a national banking association, not individually but as Trustee,	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Plaintiffs-Appellants,	No. 89 C 203
vs.	HARRY D. LEINENWEBER, *Judge.*
E-II HOLDINGS, INCORPORATED, a Delaware corporation, and AMERICAN BRANDS, INCORPORATED, a Delaware corporation,	
Defendants-Appellees.	

ORDER

On consideration of the petition for rehearing with suggestion for rehearing in banc filed March 7, 1991, in the above-entitled cause by plaintiffs-appellants, no judge in active service having requested a vote thereon, and all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing with suggestion for rehearing in banc be, and the same is hereby, DENIED.

APPENDIX 4

Statutes At Issue

Declaratory Judgment Act, 28 U.S.C. §§ 2201-02

FED. R. CIV. P. 57

Trust Indenture Act of 1939, 15 U.S.C. §§ 77aaa *et seq.*

DECLARATORY JUDGMENT ACT

28 U.S.C. § 2201.

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of Canadian merchandise, as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act.

28 U.S.C. § 2202.

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

RULE 57 OF THE FEDERAL RULES OF CIVIL PROCEDURE

The procedure for obtaining a declaratory judgment pursuant to Title 28 U.S.C. § 2201, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

TRUST INDENTURE ACT OF 1939

15 U.S.C. §§ 77aaa *et seq.*, applicable provisions:

. . . .

§ 77nnn. Reports by obligor; evidence of compliance with indenture provisions

(a) Periodic reports. Each person who, as set forth in the registration statement or application, is or is to be an obligor upon the indenture securities covered thereby shall—

(1) file with the indenture trustee copies of the annual reports and of the information, documents, and other reports (or copies of such portions of any of the foregoing as the Commission may by rules and regulations prescribe) which such obligor is required to file with the Commission pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934 [15 USCS §§ 78m or 78o(d)]; or, if the obligor is not required to file information, documents, or reports pursuant to either of such sections, then to file with the indenture trustee and the Commission, in accordance with rules and regulations prescribed by the Commission, such of the supplementary and periodic information, documents, and reports which may be required pursuant to section 13 of the Securities Exchange Act of 1934 [15 USCS § 78m], in respect of a security listed and registered on a national securities exchange as may be prescribed in such rules and regulations;

(2) file with the indenture trustee and the Commission, in accordance with rules and regulations prescribed by the Commission, such additional information, documents, and reports with respect to compliance by such obligor with the conditions and covenants provided for in the indenture, as may be required by such rules and regulations, including, in the case of annual reports, if required by such rules and regulations, certificates or opinions of independent public accountants, conforming to the requirements of subsection (e) of this section, as to compliance with conditions or covenants, compliance with which is subject to verification

by accountants, but no such certificate or opinion shall be required as to any matter specified in clauses (A), (B), or (C) of paragraph (3) of subsection (c);

(3) transmit to the holders of the indenture securities upon which such person is an obligor, in the manner and to the extent provided in subsection (c) of section 313 [15 USCS § 77mmm(c)], such summaries of any information, documents, and reports required to be filed by such obligor pursuant to the provisions of paragraph (1) or (2) of this subsection as may be required by rules and regulations prescribed by the Commission; and

(4) furnish to the indenture trustee, not less often than annually, a brief certificate from the principal executive officer, principal financial officer or principal accounting officer as to his or her knowledge of such obligor's compliance with all conditions and covenants under the indenture. For purposes of this paragraph, such compliance shall be determined without regard to any period of grace or requirement of notice provided under the indenture.

The rules and regulations prescribed under this subsection shall be such as are necessary or appropriate in the public interest or for the protection of investors, having due regard to the types of indentures, and the nature of the business of the class of obligors affected thereby, and the amount of indenture securities outstanding under such indentures, and, in the case of any such rules and regulations prescribed after the indentures to which they apply have been qualified under this title [15 USCS §§ 77aaa et seq.], the additional expense, if any, of complying with such rules and regulations. Such rules and regulations may be prescribed either before or after qualification becomes effective as to any such indenture.

(b) Evidence of recording of indenture. If the indenture to be qualified is or is to be secured by the mortgage or pledge of property, the obligor upon the indenture securities shall furnish to the indenture trustee—

(1) promptly after the execution and delivery of the indenture, an opinion of counsel (who may be of counsel for

such obligor) either stating that in the opinion of such counsel the indenture has been properly recorded and filed so as to make effective the lien intended to be created thereby, and reciting the details of such action, or stating that in the opinion of such counsel no such action is necessary to make such lien effective; and

(2) at least annually after the execution and delivery of the indenture, an opinion of counsel (who may be of counsel for such obligor) either stating that in the opinion of such counsel such action has been taken with respect to the recording, filing, re-recording, and refiling of the indenture as is necessary to maintain the lien of such indenture, and reciting the details of such action, or stating that in the opinion of such counsel no such action is necessary to maintain such lien.

(c) Evidence of compliance with conditions precedent. The obligor upon the indenture securities shall furnish to the indenture trustee evidence of compliance with the conditions precedent, if any, provided for in the indenture (including any covenants compliance with which constitutes a condition precedent) which relate to the authentication and delivery of the indenture securities, to the release or the release and substitution of property subject to the lien of the indenture, to the satisfaction and discharge of the indenture, or to any other action to be taken by the indenture trustee at the request or upon the application of such obligor. Such evidence shall consist of the following:

(1) certificates or opinions made by officers of such obligor who are specified in the indenture, stating that such conditions precedent have been complied with;

(2) an opinion of counsel (who may be of counsel for such obligor) stating that in his opinion such conditions precedent have been complied with; and

(3) in the case of conditions precedent compliance with which is subject to the verification by accountants (such as conditions with respect to the preservation of specified ratios, the amount of net quick assets, negative-pledge clauses, and other similar specific conditions), a certificate or

opinion of an accountant, who, in the case of any such conditions precedent to the authentication and delivery of indenture securities, and not otherwise, shall be an independent public accountant selected or approved by the indenture trustee in the exercise of reasonable care, if the aggregate principal amount of such indenture securities and of other indenture securities authenticated and delivered since the commencement of the then current calendar year (other than those with respect to which a certificate or opinion of an accountant is not required, or with respect to which a certificate or opinion of an independent public accountant has previously been furnished) is 10 per centum or more of the aggregate amount of the indenture securities at the time outstanding; but no certificate or opinion need be made by any person other than an officer or employee of such obligor who is specified in the indenture, as to (A) dates or periods not covered by annual reports required to be filed by the obligor, in the case of conditions precedent which depend upon a state of facts as of a date or dates or for a period or periods different from that required to be covered by such annual reports, or (B) the amount and value of property additions, except as provided in paragraph (3) of subsection (d), or (C) the adequacy of depreciation, maintenance, or repairs.

(d) Certificates of fair value. If the indenture to be qualified is or is to be secured by the mortgage or pledge of property or securities, the obligor upon the indenture securities shall furnish to the indenture trustee a certificate or opinion of an engineer, appraiser, or other expert as to the fair value—

(1) of any property or securities to be released from the lien of the indenture, which certificate or opinion shall state that in the opinion of the person making the same the proposed release will not impair the security under such indenture in contravention of the provisions thereof, and requiring further that such certificate or opinion shall be made by an independent engineer, appraiser, or other expert, if the fair value of such property or securities and of all

other property or securities released since the commencement of the then current calendar year, as set forth in the certificates or opinions required by this paragraph, is 10 per centum or more of the aggregate principal amount of the indenture securities at the time outstanding; but such a certificate or opinion of an independent engineer, appraiser, or other expert shall not be required in the case of any release of property or securities, if the fair value thereof as set forth in the certificate or opinion required by this paragraph is less than $25,000 or less than 1 per centum of the aggregate principal amount of the indenture securities at the time outstanding;

(2) to such obligor of any securities (other than indenture securities and securities secured by a lien prior to the lien of the indenture upon property subject to the lien of the indenture), the deposit of which with the trustee is to be made the basis for the authentication and delivery of indenture securities, the withdrawal of cash constituting a part of the trust estate or the release of property or securities subject to the lien of the indenture, and requiring further that if the fair value to such obligor of such securities and of all other such securities made the basis of any such authentication and delivery, withdrawal, or release since the commencement of the then current calendar year, as set forth in the certificates or opinions required by this paragraph, is 10 per centum or more of the aggregate principal amount of the indenture securities at the time outstanding, such certificate or opinion shall be made by an independent engineer, appraiser, or other expert and, in the case of the authentication and delivery of indenture securities, shall cover the fair value to such obligor of all other such securities so deposited since the commencement of the current calendar year as to which a certificate or opinion of an independent engineer, appraiser, or other expert has not previously been furnished; but such a certificate of an independent engineer, appraiser, or other expert shall not be required with respect to any securities so deposited, if the fair value thereof to such obligor as set forth in the certificate or opinion required by this paragraph is less than $25,000 or less than 1 per centum

of the aggregate principal amount of the indenture securities at the time outstanding; and

(3) to such obligor of any property the subjection of which to the lien of the indenture is to be made the basis for the authentication and delivery of indenture securities, the withdrawal of cash constituting a part of the trust estate, or the release of property or securities subject to the lien of the indenture, and requiring further that if

(A) within six months prior to the date of acquisition thereof by such obligor, such property has been used or operated, by a person or persons other than such obligor, in a business similar to that in which it has been or is to be used or operated by such obligor, and

(B) the fair value to such obligor of such property as set forth in such certificate or opinion is not less than $25,000 and not less than 1 per centum of the aggregate principal amount of the indenture securities at the time outstanding,

such certificate or opinion shall be made by an independent engineer, appraiser, or other expert and, in the case of the authentication and delivery of indenture securities, shall cover the fair value to the obligor of any property so used or operated which has been so subjected to the lien of the indenture since the commencement of the then current calendar year, and as to which a certificate or opinion of an independent engineer, appraiser, or other expert has not previously been furnished.

The indenture to be qualified shall automatically be deemed (unless it is expressly provided therein that such provision is excluded) to provide that any such certificate or opinion may be made by an officer or employee of the obligor upon the indenture securities who is duly authorized to make such certificate or opinion by the obligor from time to time, except in cases in which this subsection requires that such certificate or opinion be made by an independent person. In such cases, such certificate or opinion shall be made by any independent engineer, appraiser, or

other expert selected or approved by the indenture trustee in the exercise of reasonable care.

(e) Recitals as to basis of certificate or opinion. Each certificate or opinion with respect to compliance with a condition or covenant provided for in the indenture (other than certificates provided pursuant to subsection (a)(4) of this section) shall include (1) a statement that the person making such certificate or opinion has read such covenant or condition; (2) a brief statement as to the nature and scope of the examination or investigation upon which the statements or opinions contained in such certificate or opinion are based; (3) a statement that, in the opinion of such person, he has made such examination or investigation as is necessary to enable him to express an informed opinion as to whether or not such covenant or condition has been complied with; and (4) a statement as to whether or not, in the opinion of such person, such condition or covenant has been complied with.

(f) Parties may provide for additional evidence. Nothing in this section shall be construed either as requiring the inclusion in the indenture to be qualified of provisions that the obligor upon the indenture securities shall furnish to the indenture trustee any other evidence of compliance with the conditions and covenants provided for in the indenture than the evidence specified in this section, or as preventing the inclusion of such provisions in such indenture, if the parties so agree.

§ 77ooo. Duties and responsibility of the trustee

(a) Duties prior to default. The indenture to be qualified shall automatically be deemed (unless it is expressly provided therein that any such provision is excluded) to provide that, prior to default (as such term is defined in such indenture)—

(1) the indenture trustee shall not be liable except for the performance of such duties as are specifically set out in such indenture; and

(2) the indenture trustee may conclusively rely, as to the truth of the statements and the correctness of the opinions expressed therein, in the absence of bad faith on the part of such trustee, upon certificates or opinions conforming to the requirements of the indenture; but the indenture trustee

shall examine the evidence furnished to it pursuant to section 314 [15 USCS § 77nnn] to determine whether or not such evidence conforms to the requirements of the indenture.

(b) Notice of defaults. The indenture trustee shall give to the indenture security holders, in the manner and to the extent provided in subsection (c) of section 313 [15 USCS § 77mmm(c)], notice of all defaults known to the trustee, within ninety days after the occurrence thereof: Provided, That such indenture shall automatically be deemed (unless it is expressly provided therein that such provision is excluded) to provide that, except in the case of default in the payment of the principal of or interest on any indenture security, or in the payment of any sinking or purchase fund installment, the trustee shall be protected in withholding such notice if and so long as the board of directors, the executive committee, or a trust committee of directors and/or responsible officers, of the trustee in good faith determine that the withholding of such notice is in the interests of the indenture security holders.

(c) Duties of the trustee in case of default. The indenture trustee shall exercise in case of default (as such term is defined in such indenture) such of the rights and powers vested in it by such indenture, and to use the same degree of care and skill in their exercise, as a prudent man would exercise or use under the circumstances in the conduct of his own affairs.

(d) Responsibility of the trustee. The indenture to be qualified shall not contain any provisions relieving the indenture trustee from liability for its own negligent action, its own negligent failure to act, or its own wilful misconduct, except that—

(1) such indenture shall automatically be deemed (unless it is expressly provided therein that any such provision is excluded) to contain the provisions authorized by paragraphs (1) and (2) of subsection (a) of this section;

(2) such indenture shall automatically be deemed (unless it is expressly provided therein that any such provision is excluded) to contain provisions protecting the indenture trustee from liability for any error of judgment made in good faith by a responsible officer or officers of such trustee,

unless it shall be proved that such trustee was negligent in ascertaining the pertinent facts; and

(3) such indenture shall automatically be deemed (unless it is expressly provided therein that any such provision is excluded) to contain provisions protecting the indenture trustee with respect to any action taken or omitted to be taken by it in good faith in accordance with the direction of the holders of not less than a majority in principal amount of the indenture securities at the time outstanding (determined as provided in subsection (a) of section 316 [15 USCS § 77ppp(a)]) relating to the time, method, and place of conducting any proceeding for any remedy available to such trustee, or exercising any trust or power conferred upon such trustee, under such indenture.

(e) Undertaking for costs. The indenture to be qualified shall automatically be deemed (unless it is expressly provided therein that any such provision is excluded) to contain provisions to the effect that all parties thereto, including the indenture security holders, agree that the court may in its discretion require, in any suit for the enforcement of any right or remedy under such indenture, or in any suit against the trustee for any action taken or omitted by it as trustee, the filing by any party litigant in such suit of an undertaking to pay the costs of such suit, and that such court may in its discretion assess reasonable costs, including reasonable attorneys' fees, against any party litigant in such suit, having due regard to the merits and good faith of the claims or defenses made by such party litigant: Provided, That the provisions of this subsection shall not apply to any suit instituted by such trustee, to any suit instituted by any indenture security holder, or group of indenture security holders, holding in the aggregate more than 10 per centum in principal amount of the indenture securities outstanding, or to any suit instituted by any indenture security holder for the enforcement of the payment of the principal of or interest on any indenture security, on or after the respective due dates expressed in such indenture security.

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§ 77vvv. Court review of orders; jurisdiction of offenses and suits

(a) Orders of the Commission under this title [15 USCS §§ 77aaa et seq.] (including orders pursuant to the provisions of sections 305(b) and 307(c) [15 USCS §§ 77eee(b) and 77ggg(c)]) shall be subject to review in the same manner, upon the same conditions, and to the same extent, as provided in section 9 of the Securities Act of 1933 [15 USCS § 77i], with respect to orders of the Commission under such Act.

(b) Jurisdiction of offenses and violations under, and jurisdiction and venue of suits and actions brought to enforce any liability or duty created by, this title [15 USCS §§ 77aaa et seq.], or any rules or regulations or orders prescribed under the authority thereof, shall be as provided in section 22(a) of the Securities Act of 1933 [15 USCS § 77v(a)].

APPENDIX 5

Applicable Indenture Provisions

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SECTION 4.02. *Limitation on Stock Payments.*

The Company will not directly or indirectly (a) declare or pay any dividend or make any distribution on account of its Capital Stock (other than dividends or distributions payable in Capital Stock of the Company) or (b) purchase, redeem or otherwise acquire or retire for value, or permit any Subsidiary to purchase, redeem or otherwise retire for value any of the Company's Capital Stock (such dividends, distributions, purchases, redemptions or other acquisitions or retirements being collectively referred to as "Stock Payments"), unless (i) no Event of Default shall have occurred and be continuing at the time of such Stock Payment and no Default shall occur as a consequence thereof, and (ii) such Stock Payment, together with the aggregate of all other Stock Payments made after February 28, 1987 (the amount expended for such purposes, if other than cash, to be determined in good faith by the Board of Directors and evidenced by a resolution of the Board of Directors), shall not exceed the sum of (A) (x) 25% of Cumulative Net Income up to $200,000,000, (y) 50% of Cumulative Net Income in excess of $200,000,000, and (z) 75% of Cumulative Net Income in excess of $400,000,000 (in each case such Cumulative Net Income shall be a deficit, minus 100% of such deficit) plus (B) the aggregate net proceeds, including the fair value of property other than cash (as determined in good faith by the Board of Directors and evidenced by a resolution of the Board of Directors) received by the Company from the issue or sale (other than to a Subsidiary of the Company), after the date of this Indenture, of its Capital Stock (other than any shares of common stock of the Company sold in its initial public offering of such common stock) or in connection with the conversion of any Indebtedness or other security of the Company or its Subsidiaries into such Capital Stock of the Company; *provided* that if the Securities are rated Investment Grade and the Company reasonably anticipates after discussion with the Rating Agencies that the Securities will continue to be rated Investment Grade after such Stock Payment, the percentages referred to in clause (A) above shall in all cases be 100%.

For purposes of this Section 4.02, a distribution, transfer, sale or disposition to holders of the Company's Capital Stock of (i) shares of Capital Stock of any Subsidiary or (ii) other assets of the Company without, in either case, the receipt of equivalent consideration therefor shall be regarded as a Stock Payment in the amount of the excess of the book value of the shares or other assets being so distributed at the time of such distribution over the consideration, if any, received therefor.

The provisions of this Section 4.02 shall not be violated by reason of the payment of any dividend within sixty days after the date of declaration thereof, if at said date of declaration such payment would comply with the provisions hereof.

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SECTION 4.06. *Maintenance of Properties.*

Subject to this Article Four, the Company will cause all material properties owned by or leased to it or any Material Subsidiary and used or useful in the conduct of its business or the business of such Material Subsidiary to be maintained and kept in normal condition, repair and working order and supplied with all necessary repairs, renewals, replacements, betterments and improvements thereof, all as in the judgment of the Company may be necessary, so that the business carried on in connection therewith may be properly conducted at all times; *provided* that nothing in this Section shall prevent the Company or any Material Subsidiary from discontinuing the use, operation or maintenance of any of such properties, or disposing of any of them, if such discontinuance or disposal is, in the judgment of the Board of Directors or of the board of directors of the Material Subsidiary concerned, or of an officer (or other agent employed by the Company or any of the Material Subsidiaries) of the Company or such Material Subsidiary having managerial responsibility for any such property, desirable in the conduct of the business of the Company or any Material Subsidiary, and if such discontinuance or disposal is not adverse in any material respect to the Holders.

SECTION 4.07. *Compliance Certificates.*

The Company shall deliver to the Trustee, within 100 days after the end of each fiscal year, an Officers' Certificate, stating whether or not the signers know of any Default or Event of Default. If they do know of such a Default or Event of Default, the certificate shall describe any such Default or Event of Default and its status.

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SECTION 5.01. *When Company May Merge, Etc.*

The Company may not consolidate with, merge with or into, or transfer all or substantially all of its assets (as an entirety or substantially as an entirety in one transaction or a series of related transactions), to any person unless:

(1) the Company shall be the continuing person, or the person (if other than the Company) formed by such consolidation or into which the Company is merged or to which the properties and assets of the Company are transferred shall be a person organized and existing under the laws of the United States or any State thereof or the District of Columbia and shall expressly assume, by a supplemental indenture, executed and delivered to the Trustee, all of the obligations of the Company under the Securities and this Indenture; *provided* that at all times a corporation shall be an obligor or co-obligor on the Securities if the successor person is not a corporation;

(2) immediately before and immediately after giving effect to such transaction, no Event of Default and no Default shall have occurred and be continuing;

(3) immediately after giving effect to such transaction on a pro forma basis, the Consolidated Net Worth of the surviving entity is at least equal to the Consolidated Net Worth of the Company immediately prior to such transaction;

(4) immediately after giving effect to such transaction on a pro forma basis, the Consolidated Interest Expense

Ratio of the surviving entity is at least 1:1; *provided* that, if the Consolidated Interest Expense Ratio of the Company is within the range set forth in Column A below, then the Consolidated Interest Expense Ratio of the surviving entity shall be at least equal to the lesser of the percentage of the Consolidated Interest Expense Ratio of the Company set forth in Column B below or the ratio set forth in Column C below:

(A)	(B)	(C)
1.1111:1 to 1.9999:1	90%	1.6:1
2:1 to 2.9999:1	80%	2.1:1
3:1 to 3.9999:1	70%	2.4:1
4:1 to 4.9999:1	60%	2.5:1
5:1 or more	50%	3.0:1

and *provided, further,* that, if the Consolidated Interest Expense Ratio of the surviving entity is 3:1 or more, the calculation in the preceding proviso shall be inapplicable and such transaction shall be deemed to have complied with the requirements of such provision; and

(5) the Company has delivered to the Trustee an Officers' Certificate (attaching arithmetic computations to demonstrate compliance with clause (4)) and an Opinion of Counsel, each stating that such consolidation, merger or transfer and such supplemental indenture comply with this Section 5.01 and that all conditions precedent herein provided for relating to such transaction have been complied with.

Notwithstanding the foregoing, clauses (3) and (4) shall not apply to this Section 5.01 if immediately prior to such consolidation, merger or transfer, the Securities are reasonably anticipated in good faith by the Company after discussion with the Rating Agencies to be rated Investment Grade promptly after consummation of such consolidation, merger or transfer.

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SECTION 6.01. *Events of Default.*

An "Event of Default" occurs if:

(1) the Company defaults in the payment of interest on any Securities when the same becomes due and payable and the default continues for a period of 30 days, whether or not such payment shall be prohibited by the provisions of Article Nine hereof;

(2) the Company defaults in the payment of the principal of (or premium, if any, on) any Securities when the same becomes due and payable at maturity, upon acceleration, redemption or otherwise whether or not such payment shall be prohibited by the provisions of Article Nine hereof;

(3) the Company fails to comply in any respect with any of its other agreements contained in the Securities or this Indenture, and the default continues for the period and after the notice specified below;

(4) any indebtedness of the Company or any Subsidiary of the Company for borrowed money having an outstanding principal amount of $50,000,000 or more individually or $100,000,000 or more in the aggregate, whether such indebtedness now exists or shall hereafter be created, is declared to be due and payable prior to its stated maturity, *provided* that no Event of Default shall be deemed to have occurred under this clause (4) if (a) such indebtedness is declared due and payable prior to its stated maturity as a result of a default thereunder which is other than a default in payment on such indebtedness, (b) the Company delivers to the Trustee, within five Business Days of the date of such declaration, an Officer's Certificate describing the indebtedness that has been declared due and payable and the default thereunder giving rise to such declaration and stating that the Company is taking all reasonable steps to cure such default and to have such declaration rescinded and further stating that the Company believes in its good judgment that such default will be cured and such declaration will be rescinded within 15 days of the date of the

Officer's Certificate, and (c) such default is cured and such declaration is rescinded within such 15 day period;

(5) any final judgment or final order for the payment of money in excess of $50,000,000 shall be rendered against the Company or a Subsidiary and shall not be discharged for a period (during which execution shall not be effectively stayed) of 60 consecutive days after the date on which the right to appeal has expired;

(6) the Company or any Material Subsidiary, pursuant to or within the meaning of any Bankruptcy Law:

(A) commences a voluntary case or proceeding,

(B) consents to the entry of an order for relief against it in an involuntary case or proceeding,

(C) consents to the appointment of a Custodian of it for all or substantially all of its property,

(D) makes a general assignment for the benefit of its creditors, or

(E) generally is unable to pay its debts as the same become due; or

(7) a court of competent jurisdiction enters an order or decree under any Bankruptcy Law that:

(a) is for relief against the Company or any Material Subsidiary in an involuntary case or proceeding,

(b) appoints a Custodian of the Company or any Material Subsidiary for all or substantially all of its properties, or

(c) orders the liquidation of the Company or any Material Subsidiary,

and in each case the order or decree remains unstayed and in effect for 75 days.

The term "Bankruptcy Law" means Title 11, U.S. Code or any similar Federal or state law for the relief of debtors. The

term "Custodian" means any receiver, trustee, assignee, liquidator, sequestrator or similar official under Bankruptcy Law.

A Default under clause (3) is not an Event of Default until the Trustee notifies the Company in writing, or the Holders of at least a majority of the principal amount of the Securities outstanding notify the Company and the Trustee in writing, of the Default and the Company does not cure the Default within 30 days after receipt of the notice. The notice must specify the Default, demand that it be remedied and state that the notice is a "Notice of Default." Such notice shall be given by the Trustee if so requested in writing by the Holders of a majority of the principal amount of the Securities then outstanding.

SECTION 6.02. *Acceleration.*

If an Event of Default (other than an Event of Default specified in Sections 6.01(6) and (7)) occurs and is continuing, the Trustee or the Holders of at least 25% of the principal amount of the Securities then outstanding, by written notice to the Company (and to the Trustee if such notice is given by the Holders), may, and the Trustee at such request of such Holders shall, declare all unpaid principal of, premium, if any, and accrued interest on the Securities to be due and payable immediately. If an Event of Default specified in Section 6.01(6) or (7) occurs, all unpaid principal of, premium, if any, and accrued interest on the Securities then outstanding shall *ipso facto* become and be immediately due and payable without any declaration or other act on the part of the Trustee or any Holder. The Holders of at least a majority in principal amount of the Securities by notice to the Trustee may rescind an acceleration and its consequences if (i) all existing Events of Default, other than the non-payment of the principal of and interest on the Securities which have become due only by such declaration of acceleration, have been cured or waived, and (ii) the rescission would not conflict with any judgment or decree of a court of competent jurisdiction.

SECTION 6.03. *Other Remedies.*

If an Event of Default occurs and is continuing, the Trustee may pursue any available remedy by proceeding at law or in

equity to collect the payment of principal of, premium, if any, or interest on the Securities or to enforce the performance of any provision of the Securities or this Indenture.

The Trustee may maintain a proceeding even if it does not possess any of the Securities or does not produce any of them in the proceeding. A delay or omission by the Trustee or any Securityholder in exercising any right or remedy accruing upon an Event of Default shall not impair the right or remedy or constitute a waiver of or acquiescence in the Event of Default. No remedy is exclusive of any other remedy. All available remedies are cumulative to the extent permitted by law.

SECTION 6.04. *Waiver of Past Defaults.*

Subject to Section 6.07, the Holders of at least a majority in principal amount of the outstanding Securities by notice to the Trustee may waive an existing Default or Event of Default and its consequences, except a Default in the payment of principal, premium, if any, or interest on any Security as specified in clauses (1) or (2) of Section 6.01. When a Default or Event of Default is waived, it is cured and ceases.

SECTION 6.05. *Control by Majority.*

The Holders of at least a majority in principal amount of the outstanding Securities may direct the time, method and place of conducting any proceeding for any remedy available to the Trustee or exercising any trust or power conferred on it. However, the Trustee may refuse to follow any direction that conflicts with law or this Indenture, that the Trustee determines may be unduly prejudicial to the rights of another Securityholder, or that may involve the Trustee in personal liability.

SECTION 6.06. *Limitation on Suits.*

A Securityholder may not pursue any remedy with respect to this Indenture or the Securities unless:

(1) the Holder gives to the Trustee written notice of a continuing Event of Default;

(2) the Holders of at least a majority in principal amount of outstanding Securities make a written request to the Trustee to pursue the remedy;

(3) such Holder or Holders offer to the Trustee indemnity satisfactory to the Trustee against any loss, liability or expense;

(4) the Trustee does not comply with the request within 60 days after receipt of the request and the offer of indemnity; and

(5) during such 60-day period the Holders of a majority in principal amount of the outstanding Securities do not give the Trustee a direction which is inconsistent with the request.

A Securityholder may not use this Indenture to prejudice the rights of another Securityholder or to obtain a preference or priority over such other Securityholder.

. . . .

SECTION 7.01. *Duties of Trustee.*

(a) If an Event of Default has occurred and is continuing, the Trustee shall exercise such of the rights and powers vested in it by this Indenture and use the same degree of care and skill in their exercise as a prudent person would exercise or use under the circumstances in the conduct of his own affairs.

(b) Except during the continuance of an Event of Default:

(1) the Trustee need perform only those duties as are specifically set forth in this Indenture and no others; and

(2) in the absence of bad faith on its part, the Trustee may conclusively rely, as to the truth of the statements and the correctness of the opinions expressed therein, upon certificates or opinions, which by any provision of this Indenture are required to be furnished to the Trustee and conform to the requirements of this Indenture. The Trustee, however, shall examine the certificates and opinions to determine whether or not they conform to the requirements of this Indenture.

(c) The Trustee may not be relieved from liability for its own negligent action, its own negligent failure to act, or its own willful misconduct, except that:

(1) this paragraph does not limit the effect of paragraph (b) of this Section 7.01;

(2) the Trustee shall not be liable for any error of judgment made in good faith by a Trust Officer, unless it is proved that the Trustee was negligent in ascertaining the pertinent facts; and

(3) the Trustee shall not be liable with respect to any action it takes or omits to take in good faith in accordance with a direction received by it pursuant to Section 6.05.

(d) Every provision of this Indenture that in any way relates to the Trustee is subject to paragraphs (a), (b) and (c) of this Section 7.01.

(e) The Trustee shall not be liable for interest on any money received by it except as the Trustee may agree with the Company. Money held in trust by the Trustee need not be segregated from other funds except to the extent required by law.

SECTION 7.02. *Rights of Trustee.*

Subject to Section 7.01:

(a) The Trustee may rely on any document believed by it to be genuine and to have been signed or presented by the proper person. The Trustee need not investigate any fact or matter stated in the document.

(b) Before the Trustee acts or refrains from acting, it may require an Officer's Certificate or an Opinion of Counsel, which shall conform to Section 11.05 hereof. The Trustee shall not be liable for any action it takes or omits to take in good faith in reliance on such Certificate or Opinion.

(c) The Trustee may act through its attorneys and agents and shall not be responsible for the misconduct or negligence of any agent appointed with due care.

(d) The Trustee shall not be liable for any action it takes or omits to take in good faith which it believes to be authorized or within its rights or powers, provided that the Trustee's conduct does not constitute negligence or bad faith.

. . . .

SECTION 7.05. *Notice of Defaults.*

If a Default or an Event of Default occurs and is continuing and if it is known to the Trustee, the Trustee shall mail to each Securityholder notice of the Default or Event of Default within 90 days after it occurs, unless such Default or Event of Default has been cured. Except in the case of a Default or an Event of Default in the mandatory redemption of securities pursuant to paragraph 6 of the Securities or in the payment of principal of, premium, if any, or interest on any Security, the Trustee may withhold the notice if and so long as a committee of its Trust Officers in good faith determines that withholding the notice is in the interest of Securityholders.

. . . .

SECTION 11.05. *Statements Required in Certificate or Opinion.*

Each certificate or opinion with respect to compliance with a condition or covenant provided for in this Indenture shall include:

(1) a statement that the person making such certificate or opinion has read such covenant or condition;

(2) a brief statement as to the nature and scope of the examination or investigation upon which the statements or opinions contained in such certificate or opinion are based;

(3) a statement that, in the opinion of such person, he has made such examination or investigation as is necessary to enable him to express an informed opinion as to whether or not such covenant or condition has been complied with; and

(4) a statement as to whether or not, in the opinion of such person, such condition or covenant has been complied with, and such other opinions as the Trustee may reasonably request; *provided, however,* that with respect to matters of fact an Opinion of Counsel may rely on an Officers' Certificate or certificates of public officials.